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# **UNITED STATES GENERAL ACCOUNTING OFFICE**

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August 1985

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B-187366, July 6, 1977, distinguished by B-217435, Aug. 29, 1985.

B-207304, Apr. 15, 1983, distinguished by B-216425, Aug. 21, 1985.

B-212979, Sept. 17, 1984, modified by B-212979.2, Aug. 22, 1985

B-215559, Oct. 23, 1984, modified in part by B-215559, Aug. 23, 1985.

**GENERAL GOVERNMENT MATTERS  
APPROPRIATIONS AND MISCELLANEOUS**

**APPROPRIATIONS** **B-215394 Aug. 1, 1985**  
**Refunds of Erroneous Collections**  
**Federal Land Policy and Management Act**  
**Special Treasury Account**

The Department of the Interior may, under authority of 43 U.S.C. § 1734(c), repay the Alyeska Pipeline Service Company amounts equivalent to the fair market value of equipment (originally paid for by Alyeska) no longer needed by the Department to monitor the Trans-Alaska Pipeline Project, to the extent it determines that fair market value at time of disuse accurately reflects the amounts overpaid by Alyeska under the fee-collection provisions of the Mineral Leasing Act Amendments of 1973 (30 U.S.C. § 185(1)) and the implementing right-of-way agreement. The appropriate funding source for such repayments would be the permanent appropriation for refund of money erroneously received and covered into the Treasury.

**ACCOUNTABLE OFFICERS** **B-219276 Aug. 9, 1985**  
**Relief**  
**Duplicate Checks Issued**  
**Improper Payment**

Relief is granted Army disbursing official under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official and subsequent collection attempts have been pursued.

**COMPENSATION****B-213804 Aug. 13, 1985****Collective Bargaining Agreements  
Authority to Bargain**

Grievance and arbitration procedures included in contract between Forest Service and National Federation of Federal Employees are not applicable to determinations of liability of accountable officers for physical losses or deficiencies of public funds. Under chapter 71 of title 5 of the United States Code, management's authority to bargain collectively does not extend to matters which are specifically provided for by Federal statute. 31 U.S.C. § 3527(a) specifically and comprehensively governs the resolution of questions of responsibility of accountable officers for losses of public funds. Consequently accountable officer relief cases may not be adjudicated pursuant to the negotiated grievance and arbitration procedures.

**PAYMENTS****B-215145 Aug. 13, 1985****Quantum Meruit/Valebant Basis****Absence, etc. of Contract****Government Acceptance of Goods/Services****Benefit to Government Requirement**

Bank of Bethesda's quantum meruit claim for reimbursement for its purchase of vault and related equipment for a branch office on Navy facility is denied. Even if Bank could meet threshold requirements of quantum meruit claim, it could not make the requisite showings of quantifiable benefit to the Government; and good faith (reasonable diligence). Bank may, however, be reimbursed under regulations for value of equipment it has furnished during any period for which it has been certified as nonself-sustaining.



**ENVIRONMENTAL PROTECTION      B-217744    Aug. 13, 1985**  
**AND IMPROVEMENT**

**Environmental Protection Agency Authority**  
**Fuel Performance Testing**

In response to follow up questions about B-217744, June 3, 1985, GAO affirms its opinion that the Administrative Procedure Act applies to Corporate Average Fuel Economy test procedures rulemaking. Specialized procedural requirements for Clean Air Act rulemaking do not apply to CAFE. GAO was unable to confirm the existence of a policy in the early 1970's at the Environmental Protection Agency in which the Agency disavowed the Administrative Procedure Act's exceptions to the notice and comment requirements for rulemaking. However, 1977 Amendments to Clean Air Act expressly allowed exceptions to notice and comment, and would have justified changing any previous policy to use only formal rulemaking. Strict and literal interpretation of earlier opinion is endorsed.

**DISBURSING OFFICERS      B-219203    Aug. 14, 1985**

**Relief**

**Erroneous Payments**

**Not Result of Bad Faith or Negligence**

Relief is granted Army disbursing official and her supervisor under 31 U.S.C. § 3527(c) from liability for improper payment resulting from payee's negotiation of both original and substitute military checks. Proper procedures were followed in the issuance of the substitute check, there was no indication of bad faith on the part of the disbursing official, and subsequent collection attempts have been pursued.

**LOBBYING****B-218952 Aug. 21, 1985****Legislation****Use of Federal Funds**

A Defense contractor may expend its own funds to exhort its employees to urge members of Congress to support certain weapons system appropriations without violating the antilobbying provision in the DOD Annual Appropriation Act or the antilobbying cost principle contained in the Department of Defense Federal Acquisition Regulation Supplement. However, none of these costs may be reimbursed directly or indirectly as overhead by the Federal agency with which it contracts.

**TRANSPORTATION DEPARTMENT B-217744.2 Aug. 30, 1985****National Highway Traffic Safety Administration****Administration Efficiency**

Independent review of National Highway Traffic Safety Administration's (NHTSA) denial of Ford Motor Co. petition to amend 1984 Corporate Average Fuel Economy (CAFE) standards for light trucks on timeliness grounds shows that NHTSA action was reasonable in light of the statutory flexibility to set a common period of time as the "model year" for all manufacturers for standard setting purposes. There is no significant evidence that definition of a model year as commencing in the fall of the previous year needs revision or clarification.

**PERSONNEL LAW: CIVILIAN PERSONNEL**

**OFFICERS AND EMPLOYEES**

**B-213827 Aug. 1, 1985**

**Transfers**

**Temporary Quarters**

**What Constitutes**

Employee claims temporary quarters subsistence expenses on the grounds that the quarters he occupied, a house he had contracted to purchase and upon which he had placed an earnest money deposit, were "temporary." Although the employee moved into the house on the advice of an agency official because temporary quarters were unavailable, and even though the contract was contingent upon his obtaining financing, his claim may not be allowed. An employee has no absolute right to temporary quarters subsistence expenses -- that allowance is to be used as an expedient only until the employee occupies permanent quarters. Given the evidence presented we believe the employee occupied permanent quarters when he moved into the house in question. Ronald A. Kreizenbeck, B-213827, April 2, 1984, affirmed.

**COMPENSATION**

**B-215542 Aug. 1, 1985**

**Periodic Step-Increases**

**Civilian on Military Duty**

An employee of the FAA was on leave without pay while performing active duty for training in the Army Reserve. The agency delayed the employee's periodic step increase based on the period of time he was in leave-without-pay status. The agency acted erroneously since under applicable regulations time spent in leave-without-pay status due to military service is creditable service in the computation of a waiting period for purposes of the periodic step increase, and no distinction is made between active duty for training and other active duty.

**LEAVES OF ABSENCE**                      **B-215542 Con't**  
**Civilian on Military Duty**   **Aug. 1, 1985**  
**Leave, etc. Status**

An employee of the FAA was on leave without pay while performing active duty for training in the Army Reserve. The employee was erroneously advised that he would be accruing annual leave during the period he was in leave-without-pay status, and consequently exhausted his leave. The Government is not bound by the erroneous acts of its agents and such advice does not provide a basis for allowing leave to be credited to the employee where applicable regulations provide for reduction in leave accumulation while the employee was in a leave-without-pay status.

**TRAVEL EXPENSES**                      **B-217372 Aug. 2, 1985**  
**Transfers**  
**House-Hunting Travel**  
**Reimbursement**

Employee, who was authorized a house-hunting trip in connection with a permanent change of station, claims reimbursement for expenses incurred in making telephone calls and purchasing maps while on that trip. Telephone calls and maps are not reimbursable under the house-hunting trip authority but may be reimbursed, if properly documented, as miscellaneous expenses under Federal Travel Regulations paras. 2-3.2 and 2-3.3. Employee must demonstrate that the telephone calls related to otherwise allowable expenses. It appears that the maps were necessary in locating suitable permanent living quarters in unfamiliar suburban area. Fact that these expenses were incurred prior to employee's change of residence is not relevant since house-hunting trip is an integral part of relocation process.

**TRAVEL EXPENSES****B-217483 Aug. 2, 1985****Air Travel****Fly America Act****Applicability**

Under 49 U.S.C. App. 1518 employees of the Department of State and three specified foreign affairs agencies are exempt from the requirement of 49 U.S.C. 1517 to use U.S. air carrier service available between two points, both of which are outside the United States. Even though they hold Foreign Service positions and perform functions transferred from the Department of State subsequent to the enactment of section 1518, employees of the Department of Commerce are not within the scope of its exemption.

**OFFICERS AND EMPLOYEES****B-217825 Aug. 2, 1985****Transfers****Real Estate Expenses****Reimbursement**

In order for an employee to obtain full reimbursement for allowable real estate transaction expenses incident to the sale of a residence at a former duty station, (1) title to residence must be held exclusively by the employee and/or members of his immediate family at time of notice of transfer and (2) the employee and/or members of his immediate family must be liable for all such expenses. When at time of settlement employee holds title jointly with a person who is not a member of his immediate family, a rebuttable presumption arises that the employee's share of expenses is only proportional to his title interest. This is true even if the employee held sole title at the time of the transfer notice.

**TRAVEL EXPENSES****B-213742 Aug. 5, 1985****Transfers****Reimbursement****Approval**

Employee of the Office of International Cooperation and Development (OICD), Department of Agriculture, served a 2-year tour of duty overseas, and was issued a travel authorization to travel from Riyadh, Saudi Arabia, to Fort Collins, Colorado, by way of Washington, D.C., for debriefing. The travel authorization was effectively cancelled when OICD established a position for the employee in Washington, D.C., thus making Washington his permanent duty station. Employee is entitled to reimbursement of travel and transportation expenses incurred in anticipation of and prior to cancellation of the travel authorization.

Employee served a 2-year tour of duty overseas and was issued a travel authorization to travel from Saudi Arabia to Fort Collins, Colorado, by way of Washington, D.C., for debriefing. While serving a short-term detail in Washington, D.C., agency agreed to establish a position for him there and he signed an agreement to remain in government service for 1 year. Since employee was notified, while at a temporary duty station (Washington, D.C.), that it had been changed to a permanent duty station, he may be reimbursed for round-trip travel and transportation expenses incurred between Washington, D.C., and Fort Collins for the purpose of arranging for the movement of his family and household effects and assisting in other matters incident to the relocation.

**OFFICERS AND EMPLOYEES**  
**Transfers**  
**Real Estate Expenses**  
**Reimbursement**

**B-213742 Con't**  
**Aug. 5, 1985**

Upon completion of tour of duty overseas, employee was issued a travel authorization to travel from Saudi Arabia to Fort Collins, Colorado, by way of Washington, D.C., for debriefing. Several months after his return, and following much confusion as to his duty station in the United States, employee was permanently assigned to Washington, D.C. Under the unusual circumstances presented, Fort Collins may be treated as employee's old duty station at time of his transfer to Washington, thereby making employee eligible for real estate expenses reimbursement as provided in 5 U.S.C. 5724a (a)(4). Record shows genuine confusion by agency over employee's duty station at time of Washington, D.C., transfer, but no intent to circumvent statutory requirements. B-172594, March 27, 1974, distinguished.

**OFFICERS AND EMPLOYEES**  
**Transfers**  
**Travel Orders**

**B-217723 Aug. 12, 1985**

**Required for Reimbursement of Expenses**  
**Orders Issued Subsequent to Transfer**  
**No Effect on Entitlement**

An employee appointed to a manpower shortage position was not issued orders authorizing travel and transportation allowances to his first duty station but was advised that family travel and transportation of household goods had to be accomplished within 1 year. Since these entitlements are in accordance with the statute and regulations, original orders by competent authority to perform the travel and transportation may be issued. Such orders may permit travel within the 2-year period authorized by the Federal Travel Regulations unless there is a mandatory agency regulation limiting travel and transportation in these circumstances to 1 year after the appointment.

**PROPERTY****B-217564 Aug. 13, 1985****Private****Personal Property****Sale by Overseas Employee**

Under Foreign Affairs Manual Circular No. 378, an employee who sold his automobile abroad was allowed to retain only its acquisition cost and was required to account to the Government for the profits of its sale. Where the employee had taken a month of annual leave and had driven his new car from its place of purchase in West Germany to his post of duty in New Delhi, he may not include personal travel expenses as part of the automobile's acquisition cost. Since he was reimbursed by the Government for the constructive cost of commercially shipping the vehicle from West Germany to New Delhi, any refund from profits based on personal travel expenses would contravene the Circular's prohibition against United States employees profiting directly or indirectly from the sale of personal property abroad.

**OFFICERS AND EMPLOYEES****B-218648 Aug. 13, 1985****Conflict of Interest Statutes****Duties Relating to Private Interests**

Although the language of 18 U.S.C. 208(b)(1) can be interpreted as requiring that the conflict of interest waiver be directed at a particular proceeding, the Department of Justice has recognized anticipatory waivers that deal with a particular individual and a particular financial interest, but which are otherwise directed to all future matters.



**COMPENSATION****B-217860 Aug. 14, 1985****Additional****Environmental Pay Differential****Administrative Determination**

Employee of the Navy claims entitlement to environmental differential pay for exposure to toxic chemicals used for pest control while employed as a gardner. Agency concludes that protective equipment was available which, if worn, would eliminate the potential for personal injury and that the criteria for such pay have not been met for the period claimed. GAO will not substitute its judgment for the agency's in the absence of clear and convincing evidence that the agency's determination was arbitrary and capricious.

**LEAVES OF ABSENCE****B-219112 Aug. 14, 1985****Administrative Leave****Administrative Determination**

When Federal employees request administrative leave for a brief, determinate period of time to fulfill requirements of their position, the employing agency normally has discretion to grant the request. Thus, attorneys who are required to become members of a bar to maintain their employment may generally be granted administrative leave for the time required to attend a necessary state bar admission ceremony.

**LEAVES OF ABSENCE**  
**Administrative Leave**  
**Propriety**

**B-219112 Con't**  
**Aug. 14, 1985**

When a state provides for an attorney who is a Federal employee to be sworn in to its bar in the vicinity of the attorney's permanent duty station and place of residence, the employing agency may grant administrative leave only if the attorney chooses the option of being sworn in locally. An attorney who was employed by the Federal Election Commission in Washington, D.C., and was required to join a bar therefore may not be granted administrative leave for the time he took to travel to and attend a bar admission ceremony in Denver, Colorado, where the Colorado court rules provided a procedure for him to be sworn in before a local judge in the vicinity of Washington, D.C.

**SUBSISTENCE**  
**Actual Expenses**  
**High Rate Areas**  
**Entitlement**  
**Intermediate Stopover Points**

**B-214902 Aug. 20, 1985**

A savings to the Government as the result of taking a rest stop in a high-rate geographical area within the conterminous United States rather than in Hawaii is not an "unusual circumstance" under paragraph 1-8.1c of the Federal Travel Regulations that would justify the payment of actual subsistence expenses at the intermediate stopover point. The employee may only be reimbursed the per diem rate. Gerald K. Kandel, B-214902, December 17, 1984, affirmed.

**COMPENSATION****B-213346 Aug. 21, 1985****Severance Pay****Eligibility****Involuntary Separation****Resignation to Take Temporary Position**

Employee voluntarily resigned from a permanent position to accept a temporary appointment with another agency. When the temporary appointment expired, he was separated and received no severance pay. We initially advised the interested congressman that the employee was not eligible for severance pay under 5 U.S.C. 5595, because implementing regulations in 5 C.F.R. 550.704(b)(4)(i) require that an employee must have been involuntarily separated from the permanent position preceding his temporary service. The congressman is now advised that, in view of a recent court decision holding that 5 C.F.R. 550.704(b)(4)(i) is invalid, the employee's claim for severance pay may have legal merit.

**OFFICERS AND EMPLOYEES****B-216425 Aug. 21, 1985****Transfers****Real Estate Expenses****Reimbursement**

A transferred employee sold his old residence and seeks reimbursement for a prepayment penalty incurred upon the payoff of a sewerage improvement lien on his residence. The claim may be allowed under the Federal Travel Regulations, para. 2-6.2d(1)(g), since the prepayment of the assessment to satisfy the lien was required by the lending institution and FHA regulations. Thus, it meets the test that it be customarily paid by the seller in the locality of the old official station. V. Stephen Henderson, B-207304, April 15, 1983, distinguished. The prepayment penalty was required by the municipal code and the recorded assessment roll which placed a lien on the property was an "other security instrument" within the meaning of para. 2-6.2d(1)(g).

**TRANSPORTATION**

B-216723 Aug. 21, 1985

**Household Effects****Privately Owned Vehicles, etc.**

Where employee shipped an automobile together with his household goods under a Government bill of lading, the formula set forth in paragraph 2-8.2b(5) of the Federal Travel Regulations should not be used to determine his liability for shipment of the automobile unless charges directly attributable to its shipment cannot otherwise be identified and established. Since an automobile is not an item of household goods, it was improperly shipped under the Government bill of lading and procedures for determining an employee's liability for shipping an excess weight of household goods are not applicable to a case in which shipping and special charges attributable to the automobile can be determined.

**TRANSPORTATION****Household Effects****Weight Limitation****Excess Cost Liability****Actual Expense Shipment****Computation Formula**

Liability of employee who shipped household goods in excess of the 11,000 pound weight limit is to be determined under paragraph 2-8.2b(5) of the Federal Travel Regulations based on a proration of the excess weight to the total weight of the shipment multiplied by the total charges for the shipment. The employee is not entitled to reduce the excess weight figure by the weight of 3,500 pounds of household goods never unpacked from a prior move and to compute his liability for packing charges separately from his liability for other charges for the total shipment.

**FRAUD****B-217687 Aug. 22, 1985****False Claims****Fraudulent Items as Vitiating  
Entire Voucher**

Agency denied an employee's claim for subsistence expenses, determining that he had submitted a false claim for private lodging expenses. We hold that the employee's claim for subsistence expenses during the period he resided in a private residence must be disallowed in its entirety, because the record shows that the employee knowingly furnished false information in support of his lodging claim.

**SUBSISTENCE****Per Diem****"Lodging-Plus" Basis****Lodging Costs****Documentation Requirement**

Agency denied an employee's claim for subsistence expenses, determining that he had misstated his motel expenses because the payments recorded on his receipts were higher than those entered into the motel records. We find that the agency's evidence is insufficient to establish fraud on the part of the employee, but that the employee has not sustained his burden of establishing the Government's liability for motel expenses at the higher rate shown on his receipts. Accordingly, the employee may be reimbursed only for those lodging payments which are documented in the motel records.

**FRAUD****B-217689 Aug. 22, 1985****False Claims****Fraudulent Items as Vitiating  
Entire Voucher**

Agency denied an employee's claim for subsistence expenses, determining that he had submitted a false claim for private lodging expenses. We hold that the employee's claim for subsistence expenses during the period he resided in a private residence must be disallowed in its entirety, because the record shows that the employee knowingly provided false information in support of his lodging claim.

**SUBSISTENCE****Per diem****"Lodging-Plus" Basis****Lodging Costs****Documentation Requirement**

Agency denied an employee's claim for subsistence expenses, determining that he had misstated his motel expenses for 3 days because the payments recorded on his receipts were higher than those entered into the motel records. We find that the agency's evidence is insufficient to establish fraud on the part of the employee, but that the employee has not sustained his burden of proving the Government's liability for motel expenses at the higher rate shown on his receipts. Accordingly, reimbursement for the 3 days' lodging expenses must be limited to amounts documented in the motel records. Lodging claim for an additional day is also denied since the motel's payment records indicate payment was not received, nor has a receipt been furnished.

**OFFICERS AND EMPLOYEES****B-217816 Aug. 23, 1985****Liability****Compensation Overpayment****Recovery not Barred**

Employee of the Veterans Administration who received overpayment of pay due to promotions she received prior to achieving the 1 year in grade minimum requirement requests waiver of her debt. Since the employee had been a payroll clerk, which required knowledge of various pay entitlement laws and regulations, and had been a Government employee for a number of years, she should reasonably have known she was not entitled to promotion after months in grade. Denial of waiver is sustained.

**OFFICERS AND EMPLOYEES****B-217916 Aug. 26, 1985****Transfers****Short Distances****Administrative Determination of Reimbursement  
Entitlement**

An employee appeals from the denial of his claim for relocation expenses incident to a short-distance transfer on the basis that his agency improperly used routings by way of congested interstate highways in concluding that the transfer did not increase his commuting distance by at least 10 miles. Agencies have considerable latitude in determining whether relocation of an employee's residence is or would be incident to a short-distance transfer. Though agency could have considered routings employee claims to have taken, its determination of routings used to determine the increase in commuting distance was proper.

**COMPENSATION****B-217900 Aug. 27, 1985****Additional****Environmental Pay Differential****Hazardous Duty****Administrative Determination**

Civilian employee of the Navy in an engineering technician, General Schedule position was detailed to the wage grade position of explosive test operator in which he was exposed to hazardous working conditions. Five wage grade employees with whom he worked received an environmental pay differential due to the hazardous conditions. Agency denied payment to claimant since he was a General Schedule employee. Since employee was a General Schedule employee he is not entitled to the pay differential allowed wage grade employees but the Navy should determine whether he may receive hazardous duty pay provided for General Schedule employees.

**OFFICERS AND EMPLOYEES****B-217435 Aug. 29, 1985****Transfers****Temporary Quarters****Subsistence Expenses**

Additional expenses to move a portion of household goods into temporary quarters for use as furniture, and from there to a permanent residence at the new duty station, may be considered temporary quarters subsistence expenses required to furnish the quarters. Consequently, the employee is entitled to reimbursement within the maximum amount allowed for temporary quarters subsistence expenses. Moving expenses to furnish temporary quarters are distinguishable from costs incurred to move and store household goods in an uninhabited portion of temporary quarters, which are not reimbursable without a receipt showing expenses for a given weight of household goods within the maximum allowed for temporary storage and transportation in and out of storage.



**Transfers****Government v. Employee Interest****Merit Promotion Transfers****Relocation Expense Reimbursement****Entitlement**

Two Internal Revenue Service employees accepted lateral transfers from Los Angeles District to San Francisco District pursuant to a Merit Promotion Vacancy Announcement geographically restricted to "District Wide." The employees were furnished the Vacancy Announcement subsequent to requesting consideration for openings in the San Francisco District. Generally, entitlement to relocation expenses is contingent upon a determination that transfer is not primarily for the convenience or benefit of employee or at his request. Primary responsibility for determination rests with agency. GAO will not disturb agency's determination unless clearly erroneous, arbitrary, or capricious. Since these transfers were to positions at the same grade level without known promotion potential, and the employees were not otherwise recruited for the positions, we will not disturb agency determination that transfers were primarily for employees' own convenience or benefit.

**OFFICERS AND EMPLOYEES****B-217830 Aug. 29, 1985****Promotions****Temporary****Detailed Employees****Higher Grade Duties Assignment****Wilson Case**

VA employee, a licensed practical nurse (LPN), GS-5, claims that as a GS-4 LPN, she was detailed to perform the duties of a LPN, GS-5, from October 1979 until November 1981. She seeks retroactive temporary promotion and backpay under our Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975), sustained in 56 Comp. Gen. 427 (1977), wherein we allowed retroactive temporary promotions and backpay where the employees were detailed to higher level positions for more than 120 days without approval of the former Civil Service Commission. However, the Court of Claims ruled in Wilson v. United States, 229 Ct. Cl. 510 (1981), that employees have no entitlement under statute or the Federal Personnel Manual to temporary promotions for overlong details. In Turner-Caldwell III, 61 Comp. Gen. 408 (1982), we have followed Wilson and overruled our prior Turner-Caldwell decisions with respect to pending or future claims.

**PERSONNEL LAW: MILITARY PERSONNEL**

**QUARTERS ALLOWANCE**

**B-218847 Aug. 1, 1985**

**Dependents**

**Proof of Dependency**

**Separation of Husband and Wife**

A variable housing allowance is authorized for service members to defray expenses related to their securing living quarters in high housing cost areas in the United States. Applicable regulations provide that all of the dependents of a service member who is stationed overseas must return to the United States before the member becomes eligible to receive this allowance. Thus, an Air Force sergeant stationed in Italy whose dependent daughter was returned to an area of high housing cost in the United States, but whose wife remained in the vicinity of his duty station in Italy, is ineligible to receive a variable housing allowance. This is so even though a decree of separation was entered by an Italian court, since the wife remained his dependent nonetheless.

**PAY**

**B-218899 Aug. 1, 1985**

**Retired**

**Annuity Elections for Dependents**

**Children**

**Dependency Status**

Under the laws governing military and civil service survivor annuities, only "unmarried" children are eligible child beneficiaries. This is generally because the survivor annuity programs are for the support of the dependents of deceased Government personnel, and the marriage of a child terminates the dependency relationship. No specific provision is made for a child who marries and then obtains divorce or annulment to again qualify as an "unmarried" child for annuity purposes. While it appears doubtful that a divorced child could have the annuity reinstated, there may be a basis to reinstate an annuity where the marriage is annulled since, generally, the marriage is considered to have been void from the beginning.

**STATUTES OF LIMITATION****B-218902 Aug. 1, 1985****Claims****Claims Settlement by GAO****Six Years After Date of Accrual**

A retired service member requested by letter dated April 4, 1972, that payment of his retired pay be held in suspense until further notification. In 1984 he asked that the retired pay which was being held be paid to him. His claim was received in the General Accounting Office on March 2, 1984. The claim for the period March 3, 1978, through February 29, 1984, was paid but pay for the prior period must be denied since 31 U.S.C. 3702(b)(1) bars payment of any claim not received in the General Accounting Office within 6 years from the date it accrues.

**PAY****B-219218 Aug. 20, 1985****Retired****Survivor Benefit Plan****Beneficiary Implicated in Death of Decedent**

Where claimant was a suspect in the death of her spouse, a retired Navy captain, but no charges were filed after 4 years and the claimant is now deceased, claims for retired pay and Survivor Benefit Plan annuity due may be paid since there is no conclusive evidence linking the claimant directly or indirectly with the death of the member. A mere inference as to the claimant's possible involvement is not sufficient to establish any felonious intent incident to the member's death.

**QUARTERS ALLOWANCE**

**B-217665 Aug. 23, 1985**

**Basic Allowances for Quarters (BAQ)**

**Dependents**

**Husband and Wife Both Members of  
Armed Services**

**Dependent Children From Prior Marriage**

**Parent not Occupying Government Quarters**

The statutory purpose of the basic allowance for quarters is to reimburse service members for their expenses in acquiring necessary private housing for themselves and their dependents when rent-free Government quarters are not assigned to them. Hence, when two service members marry and reside together as a family unit in non-Government quarters, and each has a dependent child who resides elsewhere, only one of the members may be credited with the quarters allowance at the "with-dependent" rate. In that situation dual payments at the "with-dependent" rate, when all of the dependent children could reside in the joint family household but for reasons of a personal nature, would result in an unwarranted gratuity unrelated to the members' housing needs.

## **PROCUREMENT LAW**

### **CONTRACTS**

**B-216589 Aug. 1, 1985**

#### **Negotiation**

**85-2 CPD 111**

#### **Offers or Proposals**

#### **Evaluation**

#### **Basis for Evaluation**

#### **Documentation**

A protest alleging that technical evaluation performed by contracting agency was improper is without merit where the record establishes that the agency's evaluation of proposals had a reasonable basis.

### **CONTRACTS**

#### **Negotiation**

#### **Offers or Proposals**

#### **Evaluation**

#### **Experience Rating**

Past performance of an offeror cannot be considered unless this experience is demonstrated in a written proposal as a technical evaluation must be based upon the information submitted with the proposal.

### **CONTRACTS**

#### **Negotiation**

#### **Prices**

#### **Unrealistically Low**

In the absence of a nonresponsibility determination, where a contract is to be awarded on a firm fixed-price basis, there is no legal basis to withhold a contract award solely because the offer is believed to be unreasonably low or even below cost.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Bias**  
**Unsubstantiated**

**B-216589 Con't**  
**Aug. 1, 1985**

GAO will not attribute bias to a member of a technical evaluation panel based on inference or supposition.

**BIDS**  
**Invitation for Bids**  
**Ambiguity Allegation**  
**Not Sustained**  
**Only One Reasonable Interpretation**

**B-217505 Aug. 1, 1985**  
**85-2 CPD 112**

Invitation for bids (IFB) calling for unit prices for repair of textile items is not ambiguous even though payment provision, standing alone, is unclear regarding basis for payment, since any ambiguity is resolved by the bid pricing schedule which clearly indicates that the contractor will be paid its unit price for each item processed.

**BIDS**  
**Invitation for Bids**  
**Clauses**  
**Economic Price Adjustment**  
**Scope of Use**  
**Administrative Determination**

Protester's contention that solicitation clause providing for price adjustments in the event of significant workload variations is not sufficiently detailed is without merit, since clause need not specify exact formula for calculating price adjustment and any disagreement can be resolved under the standard Disputes clause.

**CONTRACTS****Protests****Administrative Action****Outside Scope of Protest Procedure****B-217505 Con't****Aug. 1, 1985**

Contention that solicitation provision requiring that contractor document the work performed is not cost-effective does not raise a matter which is subject to legal challenge as it concerns the efficiency of the agency's approach rather than the legality of the award.

**CONTRACTS****Negotiation****Offers or Proposals****Evaluation****Basis for Evaluation****Documentation****B-218424 et al. Aug. 1, 1985****85-2 CPD 113**

Allegation that solicitation was for management services and that agency's technical evaluation had no reasonable basis because awardee had no experience in this area is denied. Solicitation was not issued solely to obtain management services and record shows that although awardee may not have had institutional experience in all areas, the overall team proposed by the awardee possessed the requisite experience required by the solicitation.

**CONTRACTS****Negotiation****Offers or Proposals****Evaluation****Criteria****Subcriteria--Reasonably Related to Criteria**

Allegation that agency utilized unstated criteria in evaluating proposals is denied since factors not specifically stated in the RFP may be considered where they are reasonably related to the specified criteria. Agency's consideration of "Canadian ties" of low offeror for procurement to be performed in Canada is proper since location of awardee's management and awardee's knowledge of local conditions is sufficiently correlated to the awardee's ability to effectively manage and perform certain functions specified in the RFP.



**CONTRACTS****B-218424 et al. Con't****Negotiation****Aug. 1, 1985****Offers or Proposals****Evaluation****Experience Rating****Personnel Experience v. Experience of  
Organization**

Protest alleging that agency's technical evaluation did not conform to the stated evaluation criteria because the agency improperly considered the management experience of the team proposed by the awardee, rather than solely the institutional experience of the awardee, is denied since subcontracting was not prohibited and it was not unreasonable for the agency to evaluate the experience of the team proposed by the awardee rather than solely the institutional experience of the awardee.

**CONTRACTS****Negotiation****Offers or Proposals****Evaluation****Point Rating****Propriety of Evaluation**

Allegation that agency's technical evaluators were improperly aware of each offeror's cost position when evaluating best and final offers and "leveled" the scores to ensure that the lowest cost offeror was awarded the contract is denied since record does not establish that technical evaluators' scoring reflected anything other than their reasoned judgment concerning the merits of their proposals.

**CONTRACTS****Protests****Allegations****Unsubstantiated**

Allegation that awardee did not meet definitive responsibility criteria is denied where solicitation provision which allegedly limits the class of prospective contractors does not impose any specific and objective requirements as a precondition to award.

**CONTRACTS** **B-218424 et al. Con't**  
**Protests** **Aug. 1, 1985**  
**General Accounting Office Procedures**  
**Filing Protest With Agency**

Dismissal of protest for failure to provide agency with a copy of the protest within 1 day of its filing with our Office pursuant to 4 C.F.R. § 21.1(d) (1985) is not warranted where agency was already in receipt of a protest letter by another participant in the procurement which raises essentially the same issues and, despite agency's claim of prejudice, agency acknowledges that both protests raise the same issues and agency responded in a single timely report.

**CONTRACTS**  
**Protests**  
**Interested Party Requirement**  
**Direct Interest Criterion**

Where offeror submits a proposal and protests the agency's evaluation of proposals and, if successful in its protest, protester would have an opportunity to compete since our Office could recommend that proposals be reevaluated, discussions be reopened or that requirement be recompeted, protester is an interested party notwithstanding the fact that protester has not raised any specific objections concerning the evaluation of the one higher rated proposal.

**BIDS** **B-218607 Aug. 1, 1985**  
**Evaluation** **85-2 CPD 114**  
**Propriety**  
**Criteria of Evaluation**

Bids must be evaluated on the same basis on which they were invited.



**CONTRACTS**

B-218980 et al. Aug. 1, 1985

**Protests**

85-2 CPD 116

**General Accounting Office Procedures****Timeliness of Protest**

Protester's argument that procuring agency would not be prejudiced by consideration of untimely protest is rejected since timeliness provision of Bid Protest Regulations is to be strictly enforced save for exceptions involving "significant issues" and "good cause," which are not present in protest.

**CONTRACTS****Protests****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest that agency disclosed confidential price information is untimely since it was not filed within 10 working days after the protester knew or should have known of the protested actions.

Protester's contention that it had previously contracted for design services being procured and that agency employees led it to believe that its contracts were signed is dismissed as untimely, since it was not filed within 10 working days after the protester knew or should have known the basis for its protest.

**CONTRACTS****Protests****General Accounting Office Procedures****Timeliness of Protest****Significant Issue Exception****Not for Application**

GAO will not invoke "significant issues" or "good cause" exceptions to timeliness requirements where the untimely protest does not raise issues of first impression which would have widespread significance to the procurement community and no compelling reason beyond the protester's control prevented timely filing.

Protest that procurement should have been conducted under Brooks Act procedures for procuring architect-engineering services is untimely when filed after the date responses to the solicitation were due.

The fact that a protest received in GAO after the 10-day period for filing a timely protest was sent to GAO by certified mail 2 business days before the period expired is not a basis on which to waive the protest's untimeliness.

Where solicitation for construction work in excess of \$25,000 requires the awardee to furnish performance and payment bonds pursuant to the Miller Act, 40 U.S.C. §§ 270a-270f (1982), protest that "optional" requirement for a bid guarantee should be deleted from solicitation because it places an "unnecessary burden" on local small business concerns is dismissed because applicable regulations require a bid guarantee when Miller Act bonds are required.

**CONTRACTS****B-219340 Aug. 1, 1985****Negotiation****85-2 CPD 119****Offers or Proposals****Best and Final****Discussions****Clarification v. Reopening Negotiations**

Protest that an agency improperly reopened negotiations with the competitive range offerors after the receipt of best and final offers is denied. The contracting officer's mere exploration of the feasibility of reserving to the government the right to renegotiate option year prices, a proposed contracting approach ultimately abandoned, did not rise to the level of discussions where no offeror was given the opportunity to revise or modify its price proposal, and where this contact clearly had no effect upon the acceptability of the best and final offers already submitted.

**CONTRACTS****B-219585 Aug. 1, 1985****Protests****85-2 CPD 120****Contract Administration****Not for Resolution by GAO**

An allegation that a small business contractor is utilizing a dredge owned by a large business contrary to the intent of the small business set-aside procedures under 13 C.F.R. § 21.2 (1985) is a matter of contract administration and is the responsibility of the procuring agency rather than GAO.

**GENERAL ACCOUNTING OFFICE****Jurisdiction****Maritime Matters****Waiver of Liability for Use of Foreign Vessel**

Whether contractor violates regulations prohibiting use of foreign-built dredges in the United States is a matter for the Maritime Administration, not for GAO.

**BIDS** **B-219608 Aug. 1, 1985**  
**"Buying In" 85-2 CPD 121**  
**Contracting Officer's Duties**

When a buy-in is suspected, the contracting officer must take appropriate action to ensure that potential losses are not covered through change orders or otherwise.

**BIDS**  
**Prices**  
**Below Cost**  
**Effect on Bidder Responsibility**

Protester has no legal basis to object to the submission or acceptance of a competitor's below-cost bid. Ability to perform the contract at the bid price is a matter of responsibility, and GAO does not review affirmative determinations of responsibility except in circumstances not present here.

**CONTRACTS** **B-219617 Aug. 1, 1985**  
**Protests 85-2 CPD 122**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest alleging that the protester had insufficient time to prepare its proposal is dismissed as untimely because it was not filed prior to the time set for receipt of initial proposals.

**CONTRACTS**  
**Protests**  
**Information Evaluation**  
**Sufficiency of Submitted Information**

Protest alleging a possible violation of a solicitation's evaluation provision is dismissed for failure to state the legal and factual grounds of the protest where the protest does not indicate what the evaluation provision provides or how it would be violated.

**GENERAL ACCOUNTING OFFICE**  
**Jurisdiction**  
**Contracts**  
**Walsh-Healy Act**

**B-219617 Con't**  
**Aug. 1, 1985**

Protest alleging that other offerors do not qualify as manufacturers or regular dealers under the Walsh-Healey Public Contracts Act is dismissed because an agency's determination concerning the status of an offeror under that Act is subject to review by the Small Business Administration (if a small business is involved) and the Department of Labor, not GAO.

**BIDDERS**

**B-217704 Aug. 2, 1985**

**Debarment**  
**Labor Stipulation Violations**  
**Davis-Bacon Act**  
**Wage Underpayments**  
**Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had underpaid employees and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the contractor will be debarred under the Act.

**BIDS**

**B-218379.2 Aug. 2, 1985**

**Invitation for Bids**  
**Specifications**  
**Samples**

**85-2 CPD 123**

Where a bid sample is requested, the solicitation should list those characteristics for which the sample will be examined and evaluation of the sample is limited to those listed characteristics. Protest is sustained where sample characteristics were not listed and the sample was improperly rejected for subjective reasons not related to the specifications.



**CONTRACTS** **B-218379.2** **Con't**  
**Protests** **Aug. 2, 1985**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Where protester alleges that an oral protest of solicitation requirements was timely made with agency but agency denies that oral protest was ever made, the protester did not meet the burden of proving that the oral protest was in fact made. Accordingly, where protest alleging solicitation improprieties was filed initially with GAO after bid opening, it is untimely.

CONTRACTS B-218530.2 Aug. 2, 1985  
Protests 85-2 CPD 124  
General Accounting Office Procedures  
Reconsideration Requests  
Error of Fact or Law  
Not Established

Prior decision sustaining a protest that a nonresponsibility determination lacked a reasonable basis is affirmed where the record shows that the agency, despite having the opportunity to do so, failed to provide appropriate back-up documentation to support its position.

**CONTRACTS** **B-219255.3 Aug. 2, 1985**  
**Protests** **85-2 CPD 125**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Timeliness**

GAO will not consider the merits of an untimely protest under significant issue exception to timeliness requirements where the untimely protest does not raise issue of first impression which would have widespread importance to the procurement community.

**BIDS****B-219625 Aug. 2, 1985****Responsiveness****85-2 CPD 126****Exceptions Taken to Invitation Terms****Small Business Requirements**

A bid submitted on a total small business set-aside was properly rejected as nonresponsive where the bid indicated that the bidder would not furnish supplies manufactured or produced by a small business concern.

**BIDDERS****B-216863 Aug. 5, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a subcontractor under the Davis-Bacon Act because the subcontractor had failed to pay the minimum wages and overtime compensation required by the Act and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the subcontractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and falsification of records was intentional. Therefore, the subcontractor will be debarred under the Act.

**BIDS****B-218592 Aug. 5, 1985****Invitation for Bids****85-2 CPD 128****Specifications****Minimum Needs Requirement****Administrative Determination****Reasonableness**

Protest that requirement that washers and dryers, to be furnished and maintained by the contractor, have been in use for not more than 2 years exceeds the agency's minimum needs is denied where protester fails clearly to demonstrate that contracting officials lacked a reasonable basis for determining that the requirement was necessary in order to reduce the delay and inconvenience caused by inoperative machines. Agency data on the performance of machines under the current contract with the protester suggests that machines which had been in use for more than 2 years were inoperative as much as 14 times more days per year than machines in use for 2 or less years.

**CONTRACTS****Protests****Contract Administration****Not for Resolution by GAO**

Protest of incumbent contractor furnishing its washers and dryers to the agency that requirement in the new solicitation that machines have been in use for not more than 2 years will preclude protester from using most of its machines to perform a new contract or from reselling them to the successful bidder is denied. If the protester is alleging that the current contract guarantees the right to reuse or to resell for reuse with the contracting agency, then this is a matter of contract administration and thus not for consideration under GAO's bid protest function. If it is alleging that it is bidding at a competitive disadvantage vis-a-vis firms with newer machines, a competitive disadvantage suffered by virtue of a firm's incumbency is not an unfair disadvantage which must be eliminated by the contracting agency.

**CONTRACTS****B-219447 Aug. 5, 1985****Negotiation****85-2 CPD 129****Offers or Proposals****Evaluation****Inspection of Facilities****Not Required**

Protest that contracting officer failed to conduct an on-site survey as part of proposal evaluation is dismissed because proposals are evaluated based on information submitted with them, and generally, there is no legal requirement for an on-site inspection of an offeror's facilities.

**CONTRACTS****B-219626 Aug. 5, 1985****Protests****85-2 CPD 130****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date  
for Proposals**

Protest against agency decision to award sole-source contract filed over 1 month after publication of notice in Commerce Business Daily of decision to negotiate with one source is untimely as publication placed protester on notice of basis of protest prior to closing date.

**BIDDERS****B-218097.2 Aug. 6, 1985****Qualifications****85-2 CPD 131****License Requirement****Condition Precedent to Award**

Although protester asserts that inclusion in solicitation of clause found at Federal Acquisition Regulation, 48 C.F.R. § 52.228-5, would be more effective in assuring that contractor provides workers' compensation insurance than is solicitation requirement that contractor possess a specific state license for which workers' compensation coverage is a prerequisite, both provisions have the effect of requiring such coverage and protester has not established that a bidder would have a competitive advantage from the inclusion of one provision as opposed to the other.

<b>CONTRACTS</b>	<b>B-218097.2</b>	<b>Con't</b>
<b>Protests</b>	<b>Aug. 6, 1985</b>	
<b>General Accounting Office Procedures</b>		
<b>Reconsideration Requests</b>		
<b>Error of Fact or Law</b>		
<b>Not Established</b>		

Arguments asserted as a basis for reconsideration that only reiterate those considered in the resolution of the initial protest do not provide a basis for reconsideration.

**CONTRACTS**  
**Protests**  
**Interested Party Requirement**  
**Trade Associations, etc.**

Under GAO Bid Protest Regulations, a trade association which was not an interested party to protest because it was not an actual or prospective bidder is not entitled to request reconsideration of the decision denying the protest.

**CONTRACTS** B-218260.4 Aug. 6, 1985  
**Protests** 85-2 CPD 132  
**Preparation**  
**Costs**  
**Noncompensable**

Recovery of the cost of filing and pursuing a protest is inappropriate where the remedy afforded the protester is the opportunity to compete under a revised solicitation.

**CONTRACTS****Negotiation  
Competition****B-218433, B-218434****Aug. 6, 1985****85-2 CPD 133****Incumbent Contractor  
Competitive Advantage**

Protest that incumbent had a competitive advantage is denied where the record does not demonstrate that the alleged competitive advantage resulted from unfair action or preference by the procuring agency.

**CONTRACTS****Negotiation  
Requests for Proposals  
Requirements Statement Sufficiency**

Protest that RFP contained inadequate information for offerors to submit responsive proposals is denied where protester does not demonstrate (1) that the requested information was available to the agency before the closing date for the receipt of proposals; or (2) that the information was necessary for preparing an acceptable proposal.

**CONTRACTS****Negotiation  
Requests for Proposals  
Specifications  
Restrictive  
Undue Restriction not Established**

Protest that specification precluding 2-year educational institutions from offering general education courses restricts competition on a procurement for postsecondary education programs is denied where protester has not demonstrated that the Army had no reasonable basis for this restriction.

## CONTRACTS

**B-218458 Aug. 6, 1985**

**Federal Supply Schedule 85-2 CPD 134**

### Multiple Suppliers

## Agency Issuance of a Request For Quotations

### Evaluation Propriety

Absent a showing of unreasonableness, contracting agency's determination that services of one FSS contractor were equal to those previously ordered from another will not be disturbed. Having made this determination, agency is required to order the services from the FSS contractor offering the lowest price.

**CONTRACTS**  
**Requests for Quotations**  
**Information Purposes**

Agency's issuance of an RFQ only to identify alternative Federal Supply Schedule (FSS) source for microfilm subscription services did not constitute a procurement under which protester, also an FSS source, was entitled to compete.

<b>BIDS</b>	<b>B-218561</b>	<b>Aug. 6, 1985</b>
<b>Invitation for Bids</b>	<b>85-2 CPD</b>	<b>135</b>
<b>Amendments</b>		
<b>Failure to Acknowledge</b>		
<b>Bid Nonresponsive</b>		

Where an amendment is issued to make necessary corrections in ambiguous technical specifications in an invitation for bids, failure to acknowledge receipt of such amendment renders a bid nonresponsive.

**CONTRACTS****B-218565.2 Aug. 6, 1985****Labor Stipulations****85-2 CPD 136****Service Contract of 1965****Classification of Workmen****Propriety**

A contracting officer is authorized to decide the class of service employees required to perform a service contract by selecting the appropriate description of the service from the Department of Labor Service Contract Act wage rate determination and applying it to the specification of the services required in the solicitation.

**BIDS****B-219587.1 Aug. 6, 1985****Responsiveness****85-2 CPD 137****Exceptions Taken to Invitation Terms****Delivery Provisions**

Bid offering materials F.O.B. Anaheim, California in response to IFB requiring the successful bidder to furnish and install an office in Hawaii is nonresponsive and must be rejected.

**BIDDERS****B-206164 Aug. 7, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment not Required**

The Department of Labor determined that Carlisle Electric Company, Inc., failed to pay the applicable prevailing wage rate as required by the Davis-Bacon Act, as well as proper overtime compensation. The wage underpayments resulted primarily from misclassification of employees and the overtime violations were the result of the firm's practice of "banking" overtime hours worked and paying such hours of straight-time wages in weeks where less than 40 were worked. Based upon our independent review of the record, we conclude that debarment is not appropriate in this case, since there is not sufficient evidence that the violations were accompanied by any bad faith or gross carelessness.



**CONTRACTS**

B-217255 Aug. 7, 1985

**Negotiation**

85-2 CPD 138

**Request for Proposals****Specifications****Minimum Needs****Not Overstated**

"Brand name or equal" procurement whose specifications approximate some of the characteristics of the brand name is not unduly restrictive of competition where agency has made prima facie case to show that the specifications will meet its minimum needs and protester has not shown that the agency's technical determination of its needs is unreasonable.

**CONTRACTS**

B-218451 Aug. 7, 1985

**Negotiation**

85-2 CPD 139

**Competition****Equality of Competition****Incumbent Contractor's Advantage**

GAO does not find that agency's extension of incumbent protester's contract unfairly placed protester in a noncompetitive position relative to the competition for the follow-on contract.

**CONTRACTS****Negotiation****Offers or Proposals****Best and Final****Acceptability**

Where protester's second best and final offer fails to propose the number of physicians required by the solicitation, its proposal was properly rejected.

**CONTRACTS****B-218451 Con't****Negotiation****Aug. 7, 1985****Offers or Proposals****Best and Final****Additional Rounds****Leveling Alleged**

Protester's allegation that a second round of best and final offers was unfairly requested to allow eventual awardee additional time to obtain malpractice insurance and to employ a retired Naval physician is without merit where contracting officer properly requested the second round to resolve material problems remaining with all offerors.

**CONTRACTS****B-218623 Aug. 7, 1985****Protests****85-2 CPD 141****General Accounting Office Procedures****Timeliness of Comments on Agency's Report**

Where the protester files comments on the agency report 9 working days after its receipt of the report, without requesting or being granted an extension of the 7-day period specified in the Bid Protest Regulations, the protest will not be considered.

**CONTRACTS****B-219056 Aug. 7, 1985****Protests****85-2 CPD 142****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Closing Date for Receipt  
of Quotations**

To be timely, a protest against the propriety of the salient characteristics of a brand name or equal solicitation should have been filed prior to the closing date for the receipt of quotations.



**CONTRACTS**  
**Protests**  
**Preparation**  
**Costs**  
**Compensable**

**B-218019.2 Aug. 8, 1985**  
**85-2 CPD 145**

Where GAO has no basis to question contracting agency's finding that it is not feasible to terminate an existing contract for the convenience of the government and make award to the protester, the protester, who GAO previously determined was unreasonably excluded from the competition, is, alternatively, entitled to its costs of filing and pursuing the protest at GAO, including attorney's fees, and also its proposal preparation costs.

**CONTRACTS**  
**Modification**  
**Propriety**

**B-218542 Aug. 8, 1985**  
**85-2 CPD 147**

The decision to modify a contract to increase the necessary work is improper where the contracting officer could have amended the solicitation before award so as to allow all offerors to compete on an equal basis for the agency's changed requirements. Nevertheless, if a protester could not reasonably have offered to supply the additional services at a price low enough to have received the award, the action does not warrant sustaining the protest.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Cost Realism Analysis**  
**Adequacy**

When procuring agency, using proposed costs to evaluate offerors' understanding of work to be performed, determines that incumbent's proposed costs are reasonable when compared with government estimate, purpose of cost realism analysis contemplated by solicitation has been achieved.

**CONTRACTS****B-218542 Con't****Negotiation****Aug. 8, 1985****Offers or Proposals****Unbalanced****Determination****Criteria**

An offer is not materially unbalanced merely because some labor category rates do not carry their share of the cost of work and profit. To be materially unbalanced, the estimates of labor category usage used to calculate the estimated contract price must be so unreliable that it is doubtful that the evaluated price is a reasonable estimate of the price of performance.

**CONTRACTS****Protests****Contract Administration****Not for Resolution by GAO**

Whether procuring agency should have requested certified cost or pricing data in negotiating a contract modification is a matter of contract administration.

**BIDS****B-218563 Aug. 8, 1985****Invitation for Bids****85-2 CPD 148****Specifications****Restrictive****Undue Restriction**

Protest of solicitation purchase descriptions which restrict the procurement to one manufacturer's microcomputer is sustained where agency concedes that protester's microcomputer can meet agency's current need to run a specific software package. Agency's concern about future availability of software support for the protester's equipment is too speculative a basis to warrant restriction to only one manufacturer's equipment.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Bias**  
**Unsubstantiated**

**B-218632 Aug. 8, 1985**  
**85-2 CPD 149**

Unsupported allegations of favoritism do not satisfy the protester's burden of proof. GAO will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition.

**CONTRACTS**  
**Protests**  
**Same Issue(s) Raised in Prior Case by Protester**

Where protest against solicitation seeking to restrict competition was dismissed, subsequent protest on the same bases after award under the solicitation is dismissed.

**BIDDERS**  
**Debarment**  
**Labor Stipulation Violations**  
**Davis-Bacon Act**  
**Wage Underpayments**  
**Debarment Required**

**B-218856 Aug. 8, 1985**

The Department of Labor recommended debarment of a subcontractor under the Davis-Bacon Act because the subcontractor had underpaid employees and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the subcontractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the subcontractor will be debarred under the Act.

**BIDS**  
**Mistakes**  
**Correction**  
**Nonresponsive Bids**

**B-219622 Aug. 8, 1985**  
**85-2 CPD 150**

A nonresponsive bid may not be corrected through mistake in bid procedure and late modification of a bid may not be accepted if the bid as originally submitted is nonresponsive.

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**BIDS** **B-219622 Con't**  
**Responsiveness** **Aug. 8, 1985**  
**Exceptions Taken to Invitation Terms**  
**Delivery Provisions**

Bid containing protester's standard F.O.B. origin term is nonresponsive to IFB requiring bid on F.O.B. destination basis.

**BIDS**  
**Responsiveness**  
**Low Price of Bid not a Factor**

A nonresponsive bid may not be accepted even though it would result in monetary savings to the government since acceptance would be contrary to the maintenance of the integrity of the competitive bidding system.

**CONTRACTS**  
**Protests**  
**Conferences**  
**Request Denied**  
**Protest not for Consideration on the Merits**

Where it is clear that a protest is without legal merit, GAO will dismiss protest without holding a conference which would serve no useful purpose.

**BIDS** **B-219764 Aug. 8, 1985**  
**Unsigned** **85-2 CPD 151**  
**Bid Bond Overcoming Deficiency**

Bidder's failure to sign bid may be waived as a minor informality when it is accompanied by a signed bid bond, since the signed bond is sufficient evidence of the bidder's intent to be bound.

**BIDDERS****B-217706 Aug. 9, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a subcontractor under the Davis-Bacon Act because the subcontractor had underpaid employees and had falsified certified payroll records contrary to labor standards provisions incorporated into the subcontract by reference. Based on our independent review of the record in this matter, we conclude that the subcontractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the subcontractor will be debarred under the Act.

**BIDS****B-219411.2 Aug. 9, 1985****Invitation for Bids****85-2 CPD 152****Cancellation****After Bid Opening****Not Required****Defective Solicitation**

Despite allegations that rate to be quoted by bid opening for use in an EPA clause is not properly verifiable, no cogent and compelling reason exists to cancel solicitation after bids are opened and to resolicit, if the EPA rate submitted by the low responsive bidder is proper, because neither the interests of the government nor other bidders have been prejudiced.

**BIDS****Responsiveness****Economic Price Adjustment Information**

Bidder's failure to supply information necessary for the operation of an Economic Price Adjustment (EPA) clause by bid opening renders a bid nonresponsive.



**B-219411.2 Con't**  
**Aug. 9, 1985**

BONDS	B-219412	Aug. 9, 1985
Bid	85-2	CPD 153
Deficiencies		
Amount		

**BIDS** **B-219559** **Aug. 9, 1985**  
**Acceptance Time Limitation** **85-2 CPD 154**  
**Bids Offering Different Acceptance Periods**  
**Shorter Periods**  
**Responsiveness of Bid**  
**Solicitation Provisions**

**BIDS**  
**Acceptance Time Limitation**  
**Insertion of Different Time by Bidder**

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**BIDS** **B-219559 Con't**  
**Responsiveness** **Aug. 9, 1985**  
**Low Price of Bid not a Factor**

A nonresponsive bid may not be accepted even though it would result in monetary savings to the government since acceptance would be contrary to the maintenance of the integrity of the competitive bidding system.

**CONTRACTS** **B-219605 Aug. 9, 1985**  
**Protests** **85-2 CPD 155**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Adverse Agency Action Effect**

Protest filed more than 10 working days after protester learned of initial adverse agency action (award to another firm) on protest to agency is untimely. Protester's continued pursuit of protest with contracting agency does not alter this result.

**CONTRACTS** **B-219629 Aug. 9, 1985**  
**Protests** **85-2 CPD 156**  
**Interested Party Requirement**  
**Protester not in Line for Award**

Protest from firm not in line for award if protest is upheld is dismissed because protester does not have requisite direct economic interest to be considered an "interested party" under GAO Bid Protest Regulations.

**BIDDERS****B-212396 Aug. 12, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment not Required**

A contractor failed to pay two of its employees the required minimum wage rates due to an apparent misunderstanding of the site of work provisions of the Davis-Bacon Act. The record indicates that there was a bona fide disagreement or dispute concerning the classification of its employees and the applicability of the Davis-Bacon Act. In view of the circumstances involved the Department of Labor (DOL) recommended that no further administrative action be taken. Based on our independent review of the record in this matter, we conclude that the violations under the Act are not substantial violations and that the underpayment of employees was unintentional. Therefore, we concur with DOL and the contractor will not be debarred under the Act.

**BIDDERS****B-217725 Aug. 12, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment not Required**

The Department of Labor stated that, in view of the circumstances, it was taking no further action (i.e., debarment) against a contractor for violations of the Davis-Bacon Act. Based on our independent review of the record, we conclude that the contractor underpaid employees, but the record does not contain sufficient evidence of willful violations of the labor standards provisions of the Act to warrant debarment. Rather, we find that the underpayment may have resulted from legitimate disagreement concerning classification and may not have been intentional. Therefore, the contractor will not be debarred under the Act.

**BIDS**

B-218482 Aug. 12, 1985

**Mistakes**

85-2 CPD 157

**Correction****Evidence of Error****Disclosure to Protester****Agency Refusal**

Agency's decision not to release to protester certain documents submitted by low bidder in support of mistake correction will not prevent GAO review of the propriety of the agency's decision to permit correction.

**BIDS****Mistakes****Correction****Evidence of Error****Worksheets****Establishment of Omitted Item Bid Price**

Procuring agency's determination to permit correction of mistake in low bid was proper where agency reasonably determined that low bidder's worksheets and affidavits presented clear and convincing evidence that the cost for a number of parts needed to manufacture battery chargers was omitted from bid price.

**CONTRACTS****Protests****Moot, Academic, etc. Questions****Corrective Action Proposed, Taken, etc. by Agency**

Allegation that low bidder submitted an unreasonably low bid that should be found nonresponsive does not provide a legal basis to sustain a protest. Moreover, in view of GAO finding that contracting agency properly allowed upward correction of awardee's bid, this protest issue is academic.

**CONTRACTS** **B-219008.3 Aug. 12, 1985**  
**Protests** **85-2 CPD 158**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Prior decision is affirmed where protester requesting reconsideration has not shown that original decision dismissing its protest as untimely is incorrect.

**CONTRACTS**  
**Protests**  
**Interested Party Requirement**  
**Direct Interest Criterion**

Where protest was dismissed because a protester failed to file comments on agency report, protester, rather than another bidder under same procurement, is the proper interested party under our Bid Protest Regulations to object to dismissal of its protest.

**FEDERAL ACQUISITION REGULATION B-219033 Aug. 12, 1985**  
**Proposed Revision**

GAO has no comments on the Changes clauses contained in sections 52.243-1 through 52.243-4 of the Federal Acquisition Regulation.

**CONTRACTS** **B-219446.2 Aug. 12, 1985**  
**Protests** **85-2 CPD 159**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

GAO will not reconsider its dismissal of protest as untimely where protester has not shown that its protest alleging that solicitation specifications were unduly restrictive of competition was filed prior to bid opening.

**CONTRACTS**  
**Protests**

**B-219446.2 Con't**  
**Aug. 12, 1985**

**Interested Party Requirement**  
**Direct Interest Criterion**

Under the Competition in Contracting Act of 1984 and GAO's implementing Bid Protest Regulations, only "interested parties" have standing to protest. An "interested party" is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A potential subcontractor-supplier is not considered an interested party and, therefore, does not have standing to protest.

**CONTRACTS**  
**Protests**

**B-219448.2 Aug. 12, 1985**  
**85-2 CPD 160**

**General Accounting Office Procedures**  
**Filing Protest With Agency**

Under 4 C.F.R. §21.1(d) and (f) of GAO's Bid Protest Regulations, a protest may be dismissed where the protester fails to furnish a copy of the protest to the contracting officer within 1 day after the protest is filed with GAO. We reverse our earlier dismissal of the protest where the contracting agency was aware of protest basis within 1 day after the protest was filed with GAO.

**CONTRACTS**  
**Protests**

**B-219810 Aug. 12, 1985**  
**85-2 CPD 161**

**Basis for Protest Requirement**

Protest which fails to adequately state the legal and factual grounds for protest is dismissed.

**CONTRACTS****B-219810 Con't****Protests****Aug. 12, 1985****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest issue is dismissed as untimely when not raised in a protest to GAO within 10 days after basis for it is known or should have been known.

**BIDDERS****B-216864 Aug. 13, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had failed to pay required minimum wages to its employees and to provide required certified payrolls. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the nonpayment of employees was grossly careless, coupled with an indication of bad faith. Therefore, the contractor will be debarred under the Act.

**BIDS****B-216976 Aug. 13, 1985****Late****85-2 CPD 162****Acceptance****Prejudicial to Other Bidders**

Late bid may not be considered on basis that acceptance would not prejudice competitive procurement system where protester was in possession of bid after bid opening and, therefore, could effect whether or not it would receive the award.

**BIDS****B-216976 Con't****Late****Aug. 13, 1985****Mishandling Determination****Regular Mail**

Delayed receipt of bid by grantee Egyptian contracting ministries allegedly caused by Egyptian postal authorities during customs clearance is not ground for considering late bid since postal authorities are not employees/agents of contracting ministries and solicitation permitted consideration of late bids only where the sole cause of lateness was mishandling by the contracting ministries, not the postal authorities.

**CONTRACTS****Protests****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date  
for Proposals**

Complaint that bid opening scheduled by grantee should not have been the day after national holiday is untimely when first raised after bid opening.

**BIDDERS****B-217812 Aug. 13, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Debarment Unwarranted**

Contractor's deficiencies in keeping required records under the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act resulted from lack of due care rather than attempts to willfully violate the minimum wage requirements of the contract. Thus, debarment is not appropriate but distribution of funds to the employees involved is ordered.



**BIDS** **B-218615 Aug. 13, 1985**  
**Invitation for Bids** **85-2 CPD 163**  
**Amendments**  
**Nonreceipt**  
**Bidder's Risk**  
**Bidder Exclusion not Intended**

A bidder is responsible for receipt of amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing. Where no such effort is shown, a bid that fails to acknowledge an amendment incorporating a new wage rate determination properly is rejected as nonresponsive.

**CONTRACTS** **B-219176.2 Aug. 13, 1985**  
**Protests** **85-2 CPD 164**  
**General Accounting Office Procedures**  
**Timeliness of Comments on Agency's Report**

GAO will not reopen a protest file which was closed because more than 7 working days elapsed before the protester filed comments on the agency report in our Office after the protester received a copy of the report.

**CONTRACTS** **B-215174 Aug. 14, 1985**  
**Federal Supply Schedule** **85-2 CPD 166**  
**Purchases for System**  
**Competition**  
**Adequacy**

A contractor buying for an agency must seek maximum practicable competition before placing a delivery order against a nonmandatory automatic data processing (ADP) schedule contract. Contractor's technical evaluation of the protester's equipment offered as functional equivalent to named brand computers in response to a Commerce Business Daily (CBD) announcement of intention to place a delivery order for named brand computers is consistent with the mandate to maximize competition.

**EQUIPMENT****B-215174 Con't****Automatic Data Processing Systems  
Acquisitions, etc.****Aug. 14, 1985****Federal Supply Schedule**

The overriding consideration in evaluating equivalency of product offered in response to CBD notice of contractor's intent to place delivery order for brand name computer system on behalf of agency is whether the "equal" product performs the needed function in a like manner with the desired results. Contractor's technical evaluation will not be disturbed where it is not shown to be unreasonable, and where protester merely disagrees with evaluation on basis of technical disputes, protester has not carried burden of proof.

**BIDS****B-218653 Aug. 14, 1985****Responsiveness****85-2 CPD 167****Pricing Response Nonresponsive to IFB Requirements****Failure to Bid Firm, Fixed Price**

Bid is nonresponsive where bid omitted price for indefinite quantity item required by solicitation and price was not otherwise evident from the bid itself. Failure to submit price for the item created doubt as to whether the bidder would perform the work, and if it did, at what price.

Bid is nonresponsive where bid omitted unit prices for 4,000 pounds of shaped and 4,000 pounds of flat shell plating required under solicitation. Although the bid contained a lump sum for the total amount (8,000 pounds) of the shell plating the unit prices for each type of plate could not be determined from the lump-sum bid, and unit prices were necessary to establish the material terms of the contractor's obligation.

**CONTRACTS**  
**Protests**  
**Preparation**  
**Costs**  
**Noncompensable**

**B-218653 Con't**  
**Aug. 14, 1985**

While protest against award is sustained, protester's claim for bid preparation costs and costs of filing and pursuing protest is denied where protester's bid was not eligible for award either and therefore was not unreasonably excluded from competition.

**CONTRACTORS**  
**Responsibility**  
**Determination**  
**Definitive Responsibility Criteria**  
**What Constitutes**

**B-218668 Aug. 14, 1985**  
**85-2 CPD 168**

In a procurement for the lease of office space, the zoning of an offeror's building is an aspect of the offeror's responsibility (ability to perform), and evidence of proper zoning thus may be submitted to the contracting officer at any time prior to award.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Best and Final**  
**Additional Rounds**

Negotiations properly may be reopened after submission of best and final offers where the contracting agency has a valid reason for doing so.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Best and Final**  
**Time Limit**

Agency properly may extend the original best and final closing date and set a new closing date to rectify error in advice to one of two offerors which misled the offeror into failure to submit a timely best and final offer.

**CONTRACTS** **B-218668 Con't**  
**Negotiation** **Aug. 14, 1985**  
**Offers or Proposals**  
**Evaluation**  
**Administrative Discretion**

Procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals, and GAO will not disturb agency conclusions based on an on-site inspection where not clearly shown to be arbitrary.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Administrative Discretion**  
**Cost/Pricing Evaluation**

The agency's methods used in developing a janitorial service cost estimate to be added to offered building lease prices, as well as the conclusions reached in evaluating offerors' proposed costs, are entitled to great weight and GAO will not second-guess an agency's cost determination unless clearly shown to be unreasonable.

**BIDS** **B-218730 Aug. 14, 1985**  
**Responsiveness** **85-2 CPD 169**  
**Exceptions Taken to Invitation Terms**  
**Labor Surplus Area Requirement**

Bid submitted under a total labor surplus area (LSA) set-aside was properly rejected as nonresponsive where bid did not contain an express commitment that a substantial portion of the contract will be performed in an LSA.

**B-218730 Con't**

## Labor Surplus Areas

**Aug. 14, 1985**

## Evaluation Preference

### Eligibility of Bidder

### Place of Substantial Performance

## Ambiguity--Effect

Where low bid is ambiguous as to whether bidder will perform in an LSA, bid cannot be considered eligible for award as an LSA concern.

## CONTRACTS

## Labor Surplus Areas

## Evaluation Preference

## Eligibility of Bidder

### Place of Substantial Performance

## Responsibility Matter

Protest that awardee will be unable to substantially perform in an LSA challenges the affirmative responsibility determination which GAO will not consider.

## CONTRACTS

**B-218914.3 Aug. 14, 1985**

## Negotiation

**85-2 CPD 170**

## Competition

## Equality of Competition

## Not Denied to Protester

Allegation that the protester and the proposed awardee of a contract for weapons cradle adaptors were not competing on a common basis, on grounds that the proposed awardee has been granted numerous deviations and waivers under an existing contract for the same item, is without merit when the protester cannot demonstrate that the proposed awardee's lower-priced proposal was based on the granting of similar deviations and waivers.



**CONTRACTS****B-218566 Con't****Negotiation****Aug. 15, 1985****Requests for Proposals****Specifications****Restrictive****Inability to Meet**

Protest that capabilities required by the specifications may be beyond the state of the art and involve severe risk for the contractor in developing, or probably cannot be developed within the schedule set forth in the solicitation is denied where protester fails to demonstrate by clear and convincing evidence that the specifications are, in fact, impossible to meet. The fact that meeting the specifications may involve some risk does not, of itself, render the solicitation improper, since some risk is inherent in most types of contracts and offerors are expected to allow for such risk in formulating their offers.

**CONTRACTS****Negotiation****Requests for Proposals****Specifications****Restrictive****Not Established**

Protest that contracting agency received only two proposals and that this proves that the solicitation was unduly restrictive is denied. The agency, in fact, received initial proposals from more than two offerors and, in any case, the fact that even only one firm can comply with a specification does not indicate that a violation of the competitive procurement regulations has occurred if the specification requirement is reasonable and necessary.

**CONTRACTS****B-218566 Con't****Protests****Aug. 15, 1985****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date  
for Proposals**

Protest that specifications are unduly restrictive and/or ambiguous is untimely where not filed until after the closing date for receipt of initial proposals. Protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that closing date in order to be timely.

**CONTRACTS****Protests****Moot, Academic, etc. Questions****Future Procurements**

Protest that contracting agency, which had excluded the protester from the competitive range, was in the process of significantly relaxing a specification which the protester had alleged to be unduly restrictive is premature where the agency has neither amended the request for proposals clearly to relax the specification nor made award under the solicitation.

**CONTRACTS****B-218570 Aug. 15, 1985****Negotiation****85-2 CPD 173****Offers or Proposals****Evaluation****Technically Unacceptable Proposals****Administrative Determination**

Where a protester merely repeats specific request for proposal (RFP) requirements, when RFP calls for identification of problems, proposed solutions, and innovative approaches, the agency's finding that the proposal is technically unacceptable and the resulting decision to exclude it from the competitive range are reasonable, since mere repetition of RFP requirements is not an acceptable means of demonstrating compliance with those requirements.



**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Discussion With all Offerors Requirement**  
**Exceptions**  
**Offerors not Within Competitive Range**

**B-218570 Con't**  
**Aug. 15, 1985**

Agency has no obligation to conduct discussions with an offeror whose initial proposal is either technically unacceptable or so deficient that it is not reasonably susceptible of being made acceptable without major revisions.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Rejection**  
**Failure to Meet Solicitation Requirements**  
**Submission of Resumes of Proposed Key**  
**Personnel**

Where request for proposals calls for a project manager with particular skills and experience, the mere identification of an individual who has "expressed interest" in the job is not sufficient to provide the agency with a basis to evaluate the proposed project manager.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Rejection**  
**Propriety**

Where type and quality of aircraft servicing required by request for proposals for particular Air Force base is different from base at which protester is performing similar aircraft servicing, a proposal in which manning levels are based only on the quantity of aircraft to be serviced and not on the qualitative differences between the two bases is reasonably rejected.

<b>BIDS</b>	<b>B-218597; B-218597.2</b>
<b>Responsiveness</b>	<b>Aug. 15, 1985</b>
<b>Responsiveness v.</b>	<b>85-2 CPD 174</b>
<b>Bidder Responsibility</b>	

Solicitation requirement that bidder own or have a legal right to sublease offered aircraft relates to bidder responsibility, not responsiveness; agency cannot change a matter of responsibility into one of responsiveness merely by the terms of the solicitation.

<b>BIDS</b>	<b>B-219359; B-219359.3</b>
<b>Invitation for Bids</b>	<b>Aug. 15, 1985</b>
<b>Cancellation</b>	<b>85-2 CPD 175</b>
<b>After Bid Opening</b>	
<b>Defective Solicitation</b>	

Where contracting agency determines that its needs have been overstated and can be satisfied by a significantly less expensive alternative than that specified in invitation for bids (IFB), a cogent and compelling reason exists to cancel the IFB after bid opening.

<b>CONTRACTING OFFICERS</b>	<b>B-219814 Aug. 15, 1985</b>
<b>Determinations</b>	<b>85-2 CPD 176</b>
<b>Responsibility</b>	

Even when a negative DCASMA report on a proposed contractor is present, the final determination regarding the proposed contractor's responsibility still rests with the contracting officer.

<b>CONTRACTORS</b>
<b>Responsibility</b>
<b>Determination</b>
<b>Review by GAO</b>
<b>Affirmative Finding Accepted</b>

GAO generally does not review affirmative determinations of responsibility.

Evidence of a proposed contractor's ability to meet contractual requirements is a matter of responsibility and agency may consider evidence of responsibility any time before award is made.

Where adequate competition and reasonable prices are obtained by the government and where protester has not shown a deliberate attempt by the agency to exclude it from the competition, an offeror bears the risk of nonreceipt or delay in the receipt of a solicitation.

Protest alleging that Commerce Business Daily (CBD) notice synopsizing procurement was misclassified is untimely when filed more than 10 working days after protester was advised of date when CBD notice appeared.

**CONTRACTORS**  
**Responsibility**  
**Determination**  
**Review by GAO**

**B-217567 Aug. 16, 1985**  
**85-2 CPD 179**

**Affirmative Finding Accepted**

A preaward survey is not a legal prerequisite to the contracting agency's making an affirmative determination of responsibility. GAO will not review an agency decision whether to conduct a preaward survey or the agency's affirmative determination of responsibility absent a showing of possible fraud or bad faith or a failure to apply definitive solicitation responsibility criteria.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Bias**  
**Unsubstantiated**

The protester has the burden of proving bias on the part on an agency's procurement officials, and unfair or prejudicial motives will not be attributed to the officials on the basis of inference or supposition.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Allegation that the agency used the protester's proprietary technical data in revising specifications for step one of a two-step formally advertised procurement is untimely and not for consideration since facts on which the allegation is based should have been apparent prior to the closing date for receipt of technical proposals but the allegation was not raised until after award.

<b>CONTRACTS</b>	<b>B-217567</b>	<b>Con't</b>
<b>Two-Step Procurement</b>	<b>Aug. 16, 1985</b>	
<b>Step One</b>		
<b>Offers or Proposals</b>		
<b>Evaluation</b>		
<b>Application of Criteria</b>		

Agency's determination that awardee's computer meets the RFP requirement for commercial availability is reasonable where it is supported by evidence showing that the computer has been sold to commercial organizations and foreign governments, as well as to the agency itself in the past.

In a custodial services contract, use of inspection units that are disparate in size falls within the parameters of a mandatory military standard governing random sampling requiring units to be of the same size, as far as is practicable, when the actual needs of the agency justify such use.

**CONTRACTS****B-218626.4 Aug. 16, 1985****Protests****85-2 CPD 182****General Accounting Office Procedures****Reconsideration Requests****Timeliness**

Reconsideration request is dismissed as untimely where not filed until almost 3 months after dismissal of the original protest, and the request is based on events which occurred more than 10 working days prior to GAO's receipt of the request.

**BIDS****B-218766 Aug. 16, 1985****Responsiveness****85-2 CPD 183****What Constitutes**

Bid is responsive where the bid does not take exception to any of the IFB's requirements, including the requirement that the product offered be either a "commercial" or "commercial-type" product which meets the IFB's commercial item description.

**CONTRACTORS****Responsibility****Determination****Definitive Responsibility Criteria****What Constitutes**

To the extent that Commercial Item Certification clause set forth in invitation for bids may be constructed as constituting a definitive responsibility criterion, agency's determination that bidder is responsible is reasonable in view of information acquired during the bid evaluation period.

**CONTRACTS****Awards****Propriety**

The fact that a proposed award may adversely impact on "union jobs" is not a proper factor for consideration in making the contract award.

**CONTRACTS**  
**Awards**  
**Propriety**  
**Upheld**

**B-218766 Con't**  
**Aug. 16, 1985**

Proposed award is not improper because bidder proposes to offer a foreign end product. While Buy American Act provides a preference for domestic items, it does not prohibit the procurement of foreign end products. Furthermore, the proposed award is not subject to the Buy American Act evaluation differential since the proposed awardee offered a designated country end product under the Trade Agreement Act of 1979 and the implementing procurement regulations.

**GENERAL ACCOUNTING OFFICE**  
**Jurisdiction**  
**Patent Infringement**

Basis for protest--that proposed awardee has infringed on a similar patent held by the protester--is not appropriate for review by GAO.

**CONTRACTS**  
**Protests**  
**Interested Party Requirement**  
**Potential Subcontractors**  
**Restrictive Specifications Allegation**

**B-219370 Aug. 16, 1985**  
**85-2 CPD 185**

To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and GAO Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A potential subcontractor on a direct federal procurement cannot be considered an actual or prospective bidder or offeror.

**CONTRACTS**  
**Protests**  
**Burden of Proof**  
**On Protester**

**B-219371 Aug. 16, 1985**  
**85-2 CPD 186**

Protester has failed to meet burden of proof, and protest is denied, where protester has not furnished any evidence refuting report of contracting agency.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest is dismissed as untimely when it challenges alleged impropriety in invitation for bids which was apparent prior to bid opening, but protest was not filed until subsequent to bid opening.

**CONTRACTS**  
**Awards**  
**Propriety**  
**Upheld**

**B-219780 Aug. 16, 1985**  
**85-2 CPD 187**

An allegedly inadequate debriefing is a procedural defect that does not affect the propriety of an award.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Technical Superiority v. Cost**

Where the solicitation in a negotiated procurement specifies that cost is the least important factor for award, the government may conclude that it is more advantageous to award a contract to an offeror with a superior technical proposal even though its price is not low.



**CONTRACTS****B-216901 Aug. 19, 1985****Awards****85-2 CPD 188****Erroneous****Effect of Contract Protests**

GAO denies protest of improper award to an offeror whose proposal was inconsistent on its face with material solicitation requirement because protester was not prejudiced by agency action.

**CONTRACTS****Negotiation****Offers or Proposals****Evaluation****Propriety**

GAO denies protest alleging noncompliance with mandatory technical requirements when successful technical proposal states that awardee will meet the requirements and agency properly evaluated the proposal.

**CONTRACTS****B-217444 Aug. 19, 1985****Protests****85-2 CPD 189****Moot, Academic, etc. Questions****Corrective Action Proposed, Taken, etc. by Agency**

Where agency amends invitation, as protester requested, to require successful contractor to provide guards meeting Guard II category requirements and to pay Guard II wage rates, protest is moot.

**CONTRACTS****B-218196.4 Aug. 19, 1985****Protests****85-2 CPD 190****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

General statement that timeliness of protest should be measured from a date other than the date upon which dismissal of protest was based, where protester does not specify the alleged proper date or provide other factual details, is an insufficient ground for reconsidering the dismissal.

**CONTRACTS****B-218255.3 Aug. 19, 1985****Negotiation****85-2 CPD 191****Requests for Proposals****Specifications****Adequacy****Scope of Work-Sufficiency or Detail**

Where solicitation does not require that the specified services be performed using a certain number of word processors, agency is not required to assure that all offerors propose using the same number of word processors.

**CONTRACTS****Protests****General Accounting Office Procedures****Reconsideration Requests****Error of Fact or Law****Not Established**

Agency's alleged disclosure--in a best and final offer request sent to a competitor--of protester's cost breakdown for certain contract services is not a basis for reversing prior decision denying the protest where, even if the competitor adjusted its proposal based on the disclosed information, the outcome of the competition would not have changed.

**BIDS****B-219716 Aug. 19, 1985****Late****85-2 CPD 192****Hand Carried Delay****Commercial Carrier****Failure to Deliver to Designated Office**

Contracting officer may properly reject a hand-carried bid as late when the protester marks an interior bid envelope with the solicitation number, date, and time of bid opening, but sends it through Federal Express in an overnight letter pouch that is not marked as a bid and bid, although timely delivered to a central receiving section, does not arrive in the depository for hand-carried bids until after opening. In such a case, the protester has contributed to the lateness of the bid.

**BIDS**  
**Responsiveness**  
**What Constitutes**

**B-219791 Aug. 19, 1985**  
**85-2 CPD 193**

A bid is responsive if the bidder has unconditionally offered to provide exactly what is called for in the solicitation and is not rendered nonresponsive by a below-cost bid, which concerns the responsibility of the bidder.

**CONTRACTS**

**Protests**  
**Contract Administration**  
**Not for Resolution by GAO**

Whether or not a contractor delivers the goods or services in accordance with the specifications concerns contract compliance and administration which are the responsibility of the contracting agency, not our Office.

**BIDS**  
**Invitation for Bids**  
**Specifications**  
**Restrictive**  
**Burden of Proving Undue Restriction**

**B-218598 Aug. 20, 1985**  
**85-2 CPD 194**

Protest against use of brand name or equal description in invitation for bids (IFB) is denied where the protester does not contend that it cannot meet any particular specification or that it is otherwise prejudiced by the solicitation, and fails to show that the requirements in the IFB exceed the agency's minimum needs.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Comments on Agency's Report**

**B-218711.2 Aug. 20, 1985**

Protest, dismissed because protester failed to respond to contracting agency's report (received by GAO on scheduled due date) within 7 working-day period for comments will not be reopened since GAO's acknowledgment of protest gave notice that file would be closed absent timely response.

**CONTRACTS****B-218733.2 Aug. 20, 1985****Negotiation****85-2 CPD 196****Offers or Proposals****Evaluation****Competitive Range Exclusion****Not for SBA Review**

In negotiated procurement, elimination of small business' proposal from competitive range as technically unacceptable need not be referred to Small Business Administration.

**CONTRACTS****B-218768 Aug. 20, 1985****Protests****85-2 CPD 197****General Accounting Office Function****Free and Full Competition Objective**

An offeror's economic interest in establishing itself as a sole-source supplier is not a protectable interest in a GAO bid protest.

**CONTRACTS****Requests for Quotations****Award Basis****Lowest Aggregate Price****Propriety**

Where two firms submit quotations with different proposed delivery schedules, either of which would satisfy the delivery requirements of an oral request for quotations, the agency properly accepted the lower quotation.

**CONTRACTS****Requests for Quotations****Specifications****Minimum Needs Requirement****Administrative Determination****Reasonableness**

GAO will not disturb a procuring agency's determination of its needs and the specifications necessary to meet them, or the agency's technical evaluation of proposed equipment, absent a clear showing by the protester that the agency has acted unreasonably.

**CONTRACTS****B-218786 Aug. 20, 1985****Negotiation****85-2 CPD 198****Sole-Source Basis****Justification****Inadequate**

Where there is no indication of any necessity for procuring 26 loop extenders on a noncompetitive basis from the same source where dial number recorders are justifiably being obtained sole-source, agency acquisition of loop extenders on a noncompetitive basis is improper.

**CONTRACTS****Negotiation****Sole-Source Basis****One Known Source**

Sole-source award is justified where agency reasonably believes at the time of award that only one vendor can provide a product that is compatible with its existing system and meet its needs.

**CONTRACTS****Protests****Basis for Protest Requirement**

The Buy American Act does not provide a basis for challenging a sole-source procurement since the act does not impose an absolute prohibition on the purchase of foreign-made products, but merely requires a price comparison between competing foreign and domestic offers.

**CONTRACTS****B-218860 Aug. 20, 1985****Labor Stipulations****Davis-Bacon Act****Wage Underpayments**

The Office of the Solicitor, Department of Labor (DOL), filed a motion to reconsider a portion of an administrative law judge's previous recommended decision in this Davis-Bacon Act case. While a decision on that motion was still pending, the Wage and Hour Division, DOL asked GAO to pay the workers involved. By certified mail, GAO gave notice of, and an opportunity to contest the payment issue to the contractor's attorney. In the interim, GAO was informed that DOL's motion for reconsideration was denied. Since the contractor's attorney did not respond to GAO within the 20-day period given to him by the letter, GAO ordered payment of the workers involved, and will resolve the debarment issue and related matters in a future decision.

**BIDS****B-218960; B-219377****Invitation for Bids****Aug. 20, 1985****Cancellation****85-2 CPD 199****After Bid Opening****Low Bid in Excess of Government Estimate**

Contracting officer's rejection of only responsive bid on basis of price unreasonableness, resulting in cancellation of solicitation, is proper when bid price is significantly above government estimate. Fact that resolicitation resulted in prices which were also much higher than the government estimate has no bearing on the propriety of the cancellation since contracting officer had no way of predicting such prices.

**CONTRACTS****Awards****Propriety****Upheld**

Where bids are evaluated either pursuant to preference stated in the IFB or other alternatives suggesting that award to the awardee will cost less than an award to the protester, award is not objectionable.

**CONTRACTS**

B-219001 Aug. 20, 1985

**Negotiation**

85-2 CPD 200

**Requests for Proposals****Cancellation****Administrative Discretion****Reasonable Exercise**

In a negotiated procurement, the contracting agency need only establish a reasonable basis to support its decision to cancel a solicitation. A reasonable basis exists to cancel a request for proposals where the contracting agency determines that the item required is excessive in cost and inadequate for its intended use.

**CONTRACTS****Protests****General Accounting Office Procedures****Filing Protest With Agency**

Protester's failure to furnish contracting officer with a copy of its protest to GAO within 1 day of its filing, as required by GAO's Bid Protest Regulations, will not result in dismissal of protest because the purpose of this requirement was otherwise satisfied where contracting officer was telephonically advised through agency channels of the protest on the same day it was filed with GAO and the Army command conducting the procurement received a copy of the protest, electronically transmitted to it from higher headquarters, the day after the protest was filed, which copy was provided to the contracting officer the following day.

**CONTRACTS****B-219103.2 Aug. 20, 1985****Protests****85-2 CPD 201****General Accounting Office Procedures****Filing Protest With Agency**

Where contracting agency receives an envelope containing a copy of a protest in a timely fashion but returns the envelope to the sender because it was not properly addressed, prior dismissal for failure to furnish a copy of the protest to the contracting agency within 1 day after the protest was filed with GAO is affirmed since the solicitation identified the issuing activity and the specific room number necessary to ensure proper delivery within the agency and the protester must bear the consequences of its failure to include this information.

**CONTRACTS****B-219360 Aug. 20, 1985****Negotiation****85-2 CPD 202****Offers or Proposals****Discussion With All Offerors Requirement****"Meaningful" Discussions**

Prime contractor was not obligated to continue discussions with an offeror whose proposal was found technically unacceptable, after the prime contractor had advised the offeror of the principal deficiency in its proposal and given the offeror the opportunity to correct the deficiency.



**CONTRACTS****Negotiation****Offers or Proposals****Evaluation****Errors****Not Prejudicial****B-219360 Con't****Aug. 20, 1985**

Where principal deficiency in its proposal was disclosed to the protester and, standing alone, supported the prime contractor's finding that the protester's proposal was technically unacceptable, the protester was not materially prejudiced by the prime contractor's failure to disclose other deficiencies in the proposal, since the prime contractor's decision to reject the proposal would not have changed even if the other deficiencies had been corrected.

**CONTRACTS****Negotiation****Offers or Proposals****Evaluation****Technical Acceptability****Administrative Determination**

Where protester's proposal fails to include documentation as called for by the solicitation explaining how its proposed system would meet certain technical requirements, there is a reasonable basis to find the protester's proposal technically unacceptable.

**CONTRACTS****Protests****Allegations****Unsubstantiated****B-219362 Aug. 20, 1985****85-2 CPD 203**

There is no basis for finding a deliberate effort by the contracting agency to exclude the protester from competing by failing to furnish amendments in a timely manner where the agency states that all amendments were picked up personally by protester's representative and the protester neither denies the agency's account of the facts nor presents other evidence of purposeful agency action.

**CONTRACTS**  
**Protests**  
**Allegations**  
**Unsubstantiated**

**B-219362 Con't**  
**Aug. 20, 1985**

Unsupported allegation that agency improperly disclosed protester's price during negotiated procurement, which is denied by agency, does not meet protester's burden of proving its case.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Filing Protests With Agency**

Protest will not be dismissed for failure to furnish the contracting officer a copy of the protest 1 day after filing as required by GAO's Bid Protest Regulations, where the 3-day delay in doing so did not delay protest proceedings.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Allegation that late receipt of solicitation materials prejudiced protester in preparing its proposal is untimely, and will not be considered, where the protester was aware of short timeframe for proposal preparation, but did not protest until after learning of award to another offeror nearly 3 months after the closing date for submission of proposals.

**GENERAL ACCOUNTING OFFICE      B-219362   Con't**  
**Jurisdiction                      Aug. 20, 1985**  
**Contracts**  
**Disputes**  
**Between Private Parties**

Protest that incumbent contractor harassed employees who signed letter of intent to take employment with protester if awarded contract concerns a dispute between private parties not for consideration under GAO's Bid Protest Procedures.

**CONTRACTS                              B-219369.2   Aug. 20, 1985**  
**Labor Surplus Areas                85-2   CPD   204**  
**Evaluation Preference**  
**Eligibility of Bidder**  
**Place of Substantial Performance**

Contracting agency properly refused to consider bid for labor surplus area (LSA) preference where bid listed in LSA concern eligibility clause LSA addresses and work to be performed at addresses, but did not state that the work represented more than 50 percent of the contract price and contracting agency had information which indicated that the cost of material would exceed 50 percent of the contract price and material was not listed in clause.

**EQUIPMENT                              B-216812   Aug. 21, 1985**  
**Automatic Data Processing        85-2   CPD   205**  
**Systems**  
**Acquisition, etc.**

Agency is not required to purchase automatic data processing equipment under General Services Administration schedule contract where use of the contract is not mandatory. Open market purchase under small purchase procedures is proper when price offered is most advantageous to the government.

**SMALL BUSINESS  
ADMINISTRATION**

**B-219151 Aug. 21, 1985**

**Contracts**

**Contracting With Other Government Agencies**

**Procurement Under 8(a) Program**

**Review by GAO**

Protest of section 8(a) procurement is dismissed where protester has not provided evidence which shows fraud or bad faith on the part of government officials.

**CONTRACTS**

**B-219455.3 Aug. 21, 1985**

**Protests**

**85-2 CPD 206**

**General Accounting Office Procedures**

**Reconsideration Requests**

**Timeliness**

Request for reconsideration of protest decision filed more than 10 working days after basis for reconsideration is known is untimely.

**BIDS**

**B-219600 Aug. 21, 1985**

**Guarantees**

**85-2 CPD 207**

**Checks**

**Certified Check Received After Bid Opening**

A certified check tendered to the contracting officer after bid opening does not constitute a permissible late modification of the bid because the bid was unacceptable as originally submitted as it failed to include an adequate bid guarantee.

**BIDS****B-219600 Con't****Responsiveness****Aug. 21, 1985****Failure to Furnish Something Required****Bonds****Bid**

A low bid was properly rejected as nonresponsive where the bidder furnished a bid guarantee in the form of an uncertified corporate check. Such an instrument lacks the status of a firm commitment because it is subject to dishonor through events such as insufficient funds in the account and stop payment orders.

Since a bid guarantee provision in an IFB is a material requirement which must be met at the time of bid opening, a bid which is nonresponsive due to the lack of an adequate bid guarantee cannot be made responsive by furnishing the guarantee in proper form after bid opening, except under the limited conditions set forth in the Federal Acquisition Regulation, none of which are present here.

**CONTRACTS****Offer and Acceptance****Acceptance****What Constitutes Acceptance**

Contracting officer's announcement at bid opening that protester was apparent low bidder did not constitute acceptance of protester's offer since acceptance by the government must be clear and unconditional.

**ESTOPPEL**  
**Against Government**  
**Not Established**

**B-219600 Con't**  
**Aug. 21, 1985**

**Prior Erroneous Advice, Contract Actions, etc.**

An estoppel will not be found against the government unless the government employee, upon whose action the party asserting the estoppel relied, was acting within the scope of his authority. Therefore, the government is not estopped here since a contracting officer cannot accept a nonresponsive bid which is expressly prohibited by the Federal Acquisition Regulation, which has the force and effect of law.

**CONTRACTS**  
**Negotiation**  
**Offers or Proposals**  
**Rejection**  
**Improper**

**B-212979.2 Aug. 22, 1985**  
**85-2 CPD 208**

Prior decision is modified on reconsideration to sustain protest against the rejection of the protester's offer based on the results of a second benchmark the agency had argued indicated that the protester violated the terms of the solicitation by fine-tuning its computer equipment and by failing to protect against loss of data in case of a power failure. The agency's statements in response to the protester's request for reconsideration establish that significant changes from the first benchmark in fact were made in running the second benchmark and, consequently, the test results from the second benchmark cannot be compared to the test results of the first benchmark to substantiate the agency's conclusions, especially since there are other logical, acceptable explanations for the second benchmark results.

**CONTRACTS**  
**Negotiation**  
**Competition**  
**Adequacy**

**B-218359.2 Aug. 22, 1985**  
**85-2 CPD 210**

Agency is fulfilling duty to take steps to increase competition by expressing willingness to consider alternative methods, encouraging prospective offerors and reviewing impediments to competition.

**CONTRACTS**  
**Negotiation**  
**Requests for Proposals**  
**Specifications**  
**Restrictive**  
**Undue Restriction not Established**

Agency's specification for a drug testing system does not unduly restrict competition where agency establishes prima facie case that the restriction is legitimately related to its minimum needs and, while disagreeing with the agency's technical judgment, fails to clearly show that the agency's decision to restrict competition is clearly unreasonable.

**CONTRACTS**  
**Protests**  
**Burden of Proof**  
**On Protester**

**B-218888.3 Aug. 22, 1985**  
**85-2 CPD 211**

Where awardee's compliance with solicitation requirement is subject of technical dispute between protester and contracting agency, protester has not carried burden of proof of showing that awardee's equipment would not meet the specification.

**CONTRACTS**  
**Protests**  
**Contract Administration**  
**Not for Resolution by GAO**

Whether offered product performs in accordance with specifications as promised in the proposal concerns contract administration not encompassed by GAO bid protest function.

D-66

**CONTRACTS****B-218949 Aug. 22, 1985****Modification****85-2 CPD 212****Scope of Contract Requirement**

An agency's acceptance of a contractor's post-award offer to substitute more up-to-date equipment for outdated telephone switching equipment, at no cost, is not outside the scope of the original contract where there is no significant change in the nature of the obligation of either party to the contract.

**CONTRACTS****B-219010; B-219010.2****Awards****Aug. 22, 1985****Multiple****85-2 CPD 213****Propriety**

Agency can reasonably determine to make multiple awards where no single vendor of legal research services can fulfill all of agency requirements.

**CONTRACTS****Negotiation****Requests for Proposals****Requirements Statement Sufficiency**

Agency proposal to limit access to legal research systems based on price is not objectionable where it appears that competitors were all advised prior to submitting proposals of agency's intent.

**CONTRACTS****Protests****Allegations****Not Prejudicial**

Claim of prejudice, based on assertion that courtesy copies of agency request to GAO for advance decision incident to procurement, provided to incumbent contractors named in request, gave recipients competitive advantage, is without merit where, within days, copies of request were provided publicly to all vendors at offerors conference, initial proposals were not required until 3 weeks later, and advance decision request contained no information essential to offer preparation not already provided to prospective offerors.

**D-67**





**CONTRACTS** **B-219595.2 Aug. 22, 1985**  
**Protests** **85-2 CPD 214**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Protester will not prevail on its request for reconsideration where protester merely renews its original argument and fails to show any error of law or fact warranting reversal of original decision.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Timeliness**

Request for reconsideration will be considered untimely where, based on presumption that the protester received the original decision within one week after its issuance, request is filed more than 10 working days after the protester knew or should have known the basis for its reconsideration request.

**CONTRACTS** **B-219642 Aug. 22, 1985**  
**Protests** **85-2 CPD 215**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Failure to Diligently Pursue Protest**

Where protester waits 3 months after filing a protest with the contracting agency before it files a protest with GAO--even though the agency never replied to its protest, and the protester was aware that award had been made--the protester did not diligently pursue the matter, and its protest with GAO consequently is dismissed as untimely.

**CONTRACTS****Negotiation****Offers or Proposals****Rejection****Improper****B-216772 Aug. 23, 1985****85-2 CPD 216**

Protester's proposal should not have been rejected for failing to satisfy minority business enterprise participation requirements in the solicitation where the proposals of the awardees contained similar deficiencies, but rejection for this reason did not prejudice the protester, and thus is not cause for disturbing the awards, since protester's proposal properly was rejected for another reason.

**CONTRACTS****Negotiation****Offers or Proposals****Rejection****Propriety**

An agency's incorrect characterization of the protester's proposal as "nonresponsive" does not render rejection of the proposal improper where the agency's determination of unacceptability actually constituted a reasonable basis for rejecting the protester prior to award.

**CONTRACTS****Labor Stipulations****Davis-Bacon Act****Violations****B-217809 Aug. 23, 1985**

The Department of Labor and the contractor involved entered into a settlement agreement on all issues relating to alleged Davis-Bacon Act violations. Pursuant to § 3(a) of the Davis-Bacon Act, 40 U.S.C. § 276a-2(a) (1982), our Office has the final responsibility for determining whether the contractor involved should be debarred, and for determining the ownership of the funds withheld on the contract involved. In view of the circumstances of this case, we decline to debar the contractor involved, and we will not interpose any objection to the agreement on which settlement of this matter may be made.

**CONTRACTS**  
**Protests**  
**Sustained**  
**Corrective Action**

**B-218421.4 Aug. 23, 1985**  
**85-2 CPD 217**

GAO's recommendation--that agency terminate existing contract and make award to protester--in sustained protest is withdrawn where recommendation was based in part on protester's stated capability to perform within the necessary timeframe, and agency advises GAO that: (1) the protester has failed after issuance of the recommendation, to state absolutely that it could deliver the teak or provide its best possible delivery schedule if awarded the contract; and (2) the contract must be completed by a certain date to avoid program delays and substantial additional costs.

**CONTRACTS**  
**Protests**  
**Interested Party Requirement**  
**Protester Not in Line for Award**

**B-218602.2 Aug. 23, 1985**  
**85-2 CPD 218**

Protest of the method of award to be utilized in a procurement restricted to disadvantaged small businesses under § 8(a) of the Small Business Act will not be considered where the protester is not a § 8(a) firm and therefore is not eligible for award, since protester is not an interested party under GAO Bid Protest Regulations.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Comments on Agency's Report**

**B-218942.2 Aug. 23, 1985**  
**85-2 CPD 219**

GAO will not reopen a protest file closed because more than 7 working days lapsed after the contracting agency report was received (on the scheduled due date) before the protester communicated to GAO that it did not receive the agency report. GAO's acknowledgment of the protest gave notice that the protest file would be closed in that event and reopening the file would be inconsistent with expeditious consideration of the protest.

**BIDS** **B-218975 Aug. 23, 1985**  
**Responsiveness** **85-2 CPD 220**  
**Exceptions Taken to Invitation Terms**  
**Small Business Requirements**

Bid on a total small business set-aside that does not commit the bidder to furnish items made by a small business concern is nonresponsive and must be rejected.

**BIDS** **B-219358 Aug. 23, 1985**  
**Invitation for Bids** **85-2 CPD 221**  
**Cancellation**  
**After Bid Opening**  
**Insufficient Funding**

Contracting officer may properly cancel a solicitation after bid opening where allotted funds are inadequate to make award and additional funds are unavailable.

**CONTRACTS** **B-219364 Aug. 23, 1985**  
**Protests** **85-2 CPD 222**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Significant Issue Exception**  
**Not For Application**

Untimely protest of sole-source procurement does not present significant issue within meaning of Bid Protest Regulations since GAO has issued numerous decisions setting forth basic principles governing such procurements.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest that sole-source award of contract was improper is untimely where filed after the date for receipt of initial proposals and approximately 2 months after date of publication in Commerce Business Daily of notice that sole-source negotiations were being conducted.

**CONTRACTS** **B-219607.2 Aug. 23, 1985**  
**Protests** **85-2 CPD 223**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**

Initial decision dismissing protest as untimely is affirmed where protest was not filed with GAO within 10 days after protester knew the basis for protest.

**CONTRACTORS** **B-219679 Aug. 23, 1985**  
**Responsibility** **85-2 CPD 224**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

Affirmative determinations of responsibility are not reviewable absent a showing of possible fraud or bad faith on the part of contracting officials or that definitive responsibility criteria in the solicitation may not have been met. A solicitation requirement that the contractor use personnel with certain stated qualifications is not a definitive responsibility criterion, but rather only a performance specification.

**CONTRACTS**  
**Protests**  
**Contract Administration**  
**Not for Resolution by GAO**

Whether an awardee actually employs personnel with the qualifications specified in a solicitation is a matter of contract administration, not for consideration under GAO Bid Protest Regulations.

**CONTRACTS** B-219760.2 Aug. 23, 1985  
**Protests** 85-2 CPD 225  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Constructive Notice of Procedures**

Although the protester alleges that it did not know of the requirement concerning the time for filing of a GAO protest, an untimely protest may not be considered because bidders are on constructive notice of the requirement.

**CONTRACTS**  
**Protests**  
 General Accounting Office Procedures  
 Timeliness of Protest  
 "Good Cause" Exception Applicability

The fact that a small minority-owned firm's president was overseas when notice of the basis of a protest was received by the firm does not provide a compelling reason beyond the protester's control for GAO to consider the protest under the "good cause" exception.

**BIDS** **B-219901** **Aug. 23, 1985**  
**Prices** **85-2 CPD 226**  
**Below Cost**  
**Not Basis for Precluding Award**

No legal basis exists to preclude a contract award merely because a bidder may have submitted a below cost bid.

**BIDS** **B-219979** **Aug. 23, 1985**  
**Responsiveness** **85-2 CPD 227**  
**Responsiveness v. Bidder Responsibility**

Although solicitation contained a provision requiring the listing in the bid of contractor qualifications, contracting agency could properly consider bids which failed to provide qualifications statement at bid opening, since purpose of provision is to elicit responsibility information.

**CONTRACTS**  
**Negotiation**  
**Awards**

**B-216310 et al. Aug. 26, 1985**  
**85-2 CPD 228**

**To Other Than Low Offeror**

Contention that award of contract to higher-priced, higher-scored offeror was improper is without merit where protester has not provided evidence that contracting officer's determination that higher technical score of awardee justified higher price was unreasonable, particularly where contracting officer merely adopted results of evaluation which included cost as a factor. It is not GAO's practice to conduct investigations in response to protests; rather, burden is on protester to affirmatively establish bases for protest.

**CONTRACTS**

**Negotiation**  
**Offers or Proposals**  
**Best and Final**  
**Additional Rounds**

Contention that agency improperly distributed information not generally available to each offeror in second request for best and final offers by pointing out only those deficiencies in each offeror's own proposal is little more than a description of normal conduct of negotiations where information is limited to preclude disclosure of proprietary information. Protester offers nothing which persuades GAO that second call for best and final offers, to cure deficiencies in cost proposals, was unreasonable.

**CONTRACTS**

**Negotiation**  
**Offers or Proposals**  
**Evaluation**  
**Criteria**  
**Application of Criteria**

Contention that independent evaluations for three separate contracts to be awarded under request for proposals (RFP) were inconsistent, subjective and not properly supervised so as to preclude a fair evaluation, is without merit. RFP clearly advised of subjective nature of evaluation and offerors were on notice that three independent evaluations would be performed.



CONTRACTS	B-216310 et al.	Con't
Negotiation	Aug. 26, 1985	
Offers or Proposals		
Evaluation		
Technical Acceptability		
Administrative Determination		

CONTRACTS	B-216310 et al.	Con't
Negotiation	Aug. 26, 1985	
Offers or Proposals		
Evaluation		
Technical Acceptability		
Administrative Determination		

Contention that technical evaluations were inconsistent because two of three evaluation teams found that protester offered only 10 and 13 of 16 optional software modules allegedly offered is without merit where offers ranged from completed programs to an offer to work with the agency to develop a module. Evaluators could reasonably perceive these offers differently.

Allegation that evaluators "could not possibly have found" any basis for awarding protester less than perfect score in "vendor stability" is without merit where evaluation shows that evaluators found a lack of experience with financial and management systems, consistent with evaluation of rest of proposal which frequently noted related deficiencies in other categories.

**CONTRACTS**  
**Negotiation**  
**Technical Evaluation Panel**  
**Members**  
**Qualifications**

The composition of technical evaluation teams is within contracting agency's discretion. GAO will not review qualification of panel members absent showing of possible bad faith, fraud or conflict of interest, none of which is alleged here.

**CONTRACTS** **B-216310, et al. Con't**  
**Protests** **Aug. 26, 1985**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**  
**What Constitutes Notice**

Failure of protesters to file comments after debriefing suggests that protesters knew bases for protests against application of solicitation's cost/technical tradeoff criteria when protesters received notice of award and cost of contract. These protests are untimely under GAO Bid Protest Procedures, because they were not filed within 10 working days of notice.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Significant Issue Exception**  
**Not for Application**

Untimely protests against application of cost/technical tradeoff criteria in negotiated procurement do not fall within significant issue exception to timeliness rules of GAO Bid Protest Procedures, because they apply only to present procurement and involve issues pertaining to evaluation of proposals which have been considered previously.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Allegation, filed after final closing date for proposals and award of contract, that amendments to request for proposals diluted requirements in favor of other vendors is untimely. GAO Bid Protest Procedures require that allegations of improprieties apparent in a solicitation be filed prior to the next closing date for submission of proposals.

**CONTRACTORS****Responsibility****Determination****Review by GAO****Affirmative Finding Accepted****B-217203 Aug. 26, 1985****85-2 CPD 229**

Allegation that the awardee cannot perform the contract in accordance with all its terms involves a matter of the awardee's responsibility; GAO will not review a contracting agency's affirmative determination of responsibility unless the protester shows possible fraud or bad faith on the part of contracting officials or alleges that the solicitation contains definitive responsibility criteria which have been misapplied.

**CONTRACTS****Negotiation****Cost, etc. Data****Disclosure**

Contracting agency's disclosure of the incumbent contractor's subcontractors to new contractor is not improper as the names of the subcontractors were not confidential or proprietary.

**CONTRACTS****Offers or Proposals****Best and Final****Discussions****All Offerors Requirement**

Affording the protester the opportunity to submit a best and final proposal and to delete unacceptable portions of its initial proposal constituted adequate discussions.

**CONTRACTS**  
**Protests**  
**Contract Administration**  
**Not for Resolution by GAO**

**B-217203 Con't**  
**Aug. 26, 1985**

Whether a contractor performs in accordance with all of the contract's terms is a matter of contract administration, which is the responsibility of the contracting agency, not GAO under its bid protest function.

GAO will only question agency's waiving or changing a contract's terms where the protester shows that the agency, prior to award, intended to alter the contract, or that the changed contract is materially different from the contract for which competition was held.

**BIDDERS**  
**Debarment**  
**Labor Stipulation Violations**  
**Davis-Bacon Act**  
**Wage Underpayments**  
**Debarment Required**

**B-217811 Aug. 26, 1985**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had falsified certified payroll records, and failed to pay its employees overtime compensation. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the contractor will be debarred under the Act.

**BIDDERS**  
**Responsibility v. Bid**  
**Responsiveness**  
**Place of Performance**

**B-219116 Aug. 26, 1985**  
**85-2 CPD 230**

Failure to complete an invitation's Place of Performance clause properly is a matter of bidder responsibility, not bid responsiveness, and thus does not automatically render the firm ineligible for award.

**CONTRACTS**  
**Protests**  
**Abandoned**

**B-219116 Con't**  
**Aug. 26, 1985**

Where agency specifically rebuts issues raised in the initial protest and protester fails to comment on the agency's rebuttal in its comments to the agency report, the issues are deemed abandoned.

**CONTRACTS**

**Protests**

**General Accounting Office Procedures**

**Timeliness of Protest**

**Date Basis of Protest Made Known to Protester**

Where protester raises new grounds of protest in its comments to the agency report and the grounds were known or should have been known more than 10 days prior to the submission of the comments, the new grounds of protest are untimely and will not be considered.

**CONTRACTS**

**Protests**

**Interested Party Requirement**

**Protester not in Line for Award**

Protester is not an interested party to protest conflicting prices for items in prospective awardee's original and duplicate bids where protester did not bid for those items.

**CONTRACTS**

**Protests**

**Moot, Academic, etc. Questions**

**Corrective Action Proposed, Taken, etc. by Agency**

Allegation that Trade Agreements Act prohibits award to bidder which indicated foreign source for item with estimated use in excess of \$156,000 will not be considered where agency states that bidder will not receive award for that item.

**CONTRACTS****B-217237 Aug. 27, 1985****In-House Performance v.****85-2 CPD 231****Contracting Out****Cost Comparison****Agency In-House Estimate****Basis**

Office of Management and Budget Circular A-76 implicitly excludes all other procuring agency severance pay formulas.

Based on review of record, GAO cannot conclude that agency failed to provide a rational basis for its A-76 cost determination involving material costs, conversion cost differential, and alleged additional contract support costs.

**OFFICE OF MANAGEMENT AND BUDGET****Circulars****No. A-76****Policy Matters****Not for GAO Review**

Protest allegation that procuring agency improperly compressed procedures of Office of Management and Budget Circular A-76 in determining whether contracted service should be returned to in-house performance will not be considered since it involves agency's compliance with executive branch policy of Circular that GAO does not review.

**CONTRACTS****B-219363 Aug. 27, 1985****Protests****85-2 CPD 232****General Accounting Office Procedures****Timeliness of Protest****Date Basis of Protest Made Known to Protester**

Protest of sole-source award of contract filed more than 10 days after publication of Commerce Business Daily notice of award is untimely.

Untimely protest of sole-source procurement does not present significant issue within meaning of Bid Protest Regulations since GAO has issued numerous decisions setting forth basic principles governing such procurements.

An award made on the basis of initial proposals was proper where the solicitation notified offerors that award might be made on the basis of initial proposals, without discussions, and the number of proposals and the range of prices support the contracting agency's conclusion that there was adequate competition resulting in a reasonable price to the government.

Protester could not reasonably assume that the contracting agency waived the right to make award without discussions, based on contracting officer's statement at preproposal conference that a typical schedule for the procurement would include submission of best and final offers, and contracting officer at same conference cautioned offerors that the solicitation (which reserved the government's right to make award without discussions) would not be modified except by written amendment.

**CONTRACTS****B-219388 Con't****Negotiation****Aug. 27, 1985****Offers or Proposals****Discussion With all Offerors Requirement****Varying Degrees of Discussions****Propriety**

Protester fails to show that contracting agency conducted discussions with only some offerors where only evidence offered is a statement allegedly made by another offeror and all contracting agency personnel involved in the procurement deny having any communications with any offeror after initial proposals were received.

**CONTRACTS****Negotiation****Offers or Proposals****Evaluation****Technical Transfusion Prohibition**

Protester's contention that contracting agency engaged in technical transfusion or leveling is without merit where there is no evidence of any discussions with any offeror and awardee's proposal does not contain the technical feature which the protester contends was transferred to it by the agency.

**CONTRACTS****B-219713 Aug. 27, 1985****Protests****85-2 CPD 235****General Accounting Office Procedures****Timeliness of Protest****Solicitation Improprieties****Apparent Prior to Bid Opening/Closing Date  
for Proposals**

Protest that invitation for bids (IFB) is ambiguous is untimely where not filed with GAO before bid opening. Protester's letter to agency requesting clarification of IFB, received by agency before bid opening, does not constitute a protest because it lacks any expression of dissatisfaction or request for corrective action.



**CONTRACTS** **B-219713** **Con't**  
**Protests** **Aug. 27, 1985**  
**Interested Party Requirement**

<b>CONTRACTS</b>	<b>B-219805.2</b>	<b>Aug. 27, 1985</b>
<b>Protests</b>	<b>85-2 CPD</b>	<b>236</b>
<b>Moot, Academic, etc. Questions</b>		
<b>Future Procurements</b>		

<b>BIDS</b>	<b>B-216734 Aug. 28, 1985</b>
<b>    Invitation for Bids</b>	<b>85-2 CPD 237</b>
<b>    Cancellation</b>	
<b>    Resolicitation</b>	
<b>    Use of Proper Evaluation Criteria</b>	

D-84

**BIDDERS****B-217857 Aug. 28, 1985****Debarment****Labor Stipulation Violations****Davis-Bacon Act****Wage Underpayments****Debarment Required**

The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had falsified certified payroll records, failed to pay its employees overtime compensation, and had committed other violations. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the contractor will be debarred under the Act.

**CONTRACTS****Labor Stipulations****Davis-Bacon Act****Wage Underpayments**

Where, as here, the funds on deposit with GAO which have been withheld by a contracting officer pursuant to § 1(a) of the Davis-Bacon Act, 40 U.S.C. § 276a(a) (1982) are insufficient to cover the amount due to the workers involved, the amount available should be distributed on a pro-rata basis among them.

**CONTRACTS****B-218961 Aug. 28, 1985****Negotiation****85-2 CPD 238****Offers or Proposals****Evaluation****Technical Superiority v. Cost**

Protest that proposal, lower in cost than awardee's, offered equal technical competence and therefore was improperly not selected for award is denied since the successful proposal reasonably was considered better technically, the evaluated cost difference was not great, and technical considerations under the solicitation were of greater importance to the government than cost.

**B-219234 Aug. 28, 1985**

**85-2 CPD 239**

### Determination

## Review by GAO

### Affirmative Finding Accepted

Protest against awardee's ability to provide equipment meeting brand name or equal specifications challenges the contracting officer's affirmative determination of the awardee's responsibility, which this Office does not review unless the protester shows possible fraud on the part of the contracting officials or alleges that the solicitation contains definitive responsibility criteria which have been misapplied.

## CONTRACTS

## Protests

## Contract Administration

**Not for Resolution by GAO**

Whether an awardee's delivered equipment actually conforms to the contract requirements is a matter of contract administration and is not encompassed by the bid protest function.

## BIDS

**B-219437 Aug. 28, 1985**

## Mistakes

**85-2 CPD 240**

## Correction

### After Bid Opening

### Rule

Where a bidder alleges mistake after bid opening, it is not then generally free to decide to waive its claim. Waiver will be permitted only if it is clear that the intended bid would have been the lowest even though the intended bid could not be clearly proven for the purpose of bid correction. Agency properly rejected bid without giving the bidder a chance to waive its mistake where it was doubtful that the intended bid would have been the lowest.

**BIDS**  
**Mistakes**  
**Correction**  
**Denial**

**B-219437 Con't**  
**Aug. 28, 1985**

Agency properly did not permit correction of an error in a bid where the estimate of the cost of the work omitted from the bid price was prepared after bid opening and so that correction would have involved an impermissible recalculation of a bid to include factors not originally considered.

**BIDS**  
**Invitation for Bids**  
**Ambiguous**  
**Objective Test**

**B-219746 Aug. 28, 1985**  
**85-2 CPD 241**

Protester's contention that invitation for bids (IFB) is ambiguous is patently without merit where IFB clearly addresses each alleged ambiguity raised by the protester.

**BIDS**  
**Opening**  
**Protest Filing Effect**

Where contracting agency advised bidders before bid opening that a protest had been filed and inquired whether any bidder agreed with protester's contention that IFB was ambiguous, there is no merit to protester's contention that agency also should have contacted all firms which requested the bid package, since agency was under no obligation to contact any actual or potential bidder before proceeding with bid opening and sole purpose of agency's action was to determine whether there was any justification for delaying bid opening.

**CONTRACTS** **B-219746 Con't**  
**Protests** **Aug. 28, 1985**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protester's contention that procurement should have been set aside for small business is untimely where not raised before bid opening.

<b>CONTRACTS</b>	<b>B-219790.2</b>	<b>Aug. 28, 1985</b>
<b>Protests</b>	<b>85-2 CPD 242</b>	
<b>General Accounting Office Procedures</b>		
<b>Reconsideration Requests</b>		
<b>Error of Fact or Law</b>		
<b>Not Established</b>		

Request for reconsideration of protest that was dismissed as untimely is denied. Although the protester characterizes its protest as one against the proposed contract award and contends that the protest is timely because the award has not yet been made, the only reason stated for objecting to the award is that the agency improperly rejected the protester's proposal, and that objection is untimely.

**CONTRACTS** **B-213160.2 Aug. 29, 1985**  
**Protests** **85-2 CPD 243**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Error of Fact or Law**  
**Not Established**

Original decision is affirmed where party requesting reconsideration does not demonstrate that it was legally incorrect.

**BIDDERS**

B-215953 Aug. 29, 1985

**Debarment**

85-2 CPD 244

**Labor Stipulation Violations****Davis-Bacon Act****Subcontractors****Debarment Required**

The Department of Labor (DOL) recommended debarment of a contractor under the Davis-Bacon Act because the contractor had failed to pay its employees the minimum wages required by the Act and had falsified certified payroll records. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees and subsequent falsification of records was intentional. Therefore, the contractor will be debarred under the Act.

**BIDDERS****Debarment****Labor Stipulation Violations****Subcontractors**

DOL requested reconsideration of our previous decision not to debar subcontractor. At the time this case was originally decided, there was nothing in the record to indicate that the subcontract contained the labor standards provisions of the prime contract or that DD Form 1566, which incorporates these labor standards provisions into the subcontract was executed. With its letter requesting reconsideration, DOL has enclosed a copy of DD Form 1566 signed by the subcontractor. Thus, DOL has shown that the subcontract was subject to the requirements of the Davis-Bacon Act.

**BIDDERS****B-217808 Aug. 29, 1985****Debarment****Labor-Stipulation Violations****Davis-Bacon Act****Debarment Unwarranted**

The Department of Labor stated that, in view of the circumstances, it did not consider further administrative action (i.e., debarment) necessary against a contractor for violations of the Davis-Bacon Act. Based on our independent review of the record, we conclude that the contractor underpaid employees, but the record does not contain sufficient evidence of intentional violation of the labor standards provisions of the Act to warrant debarment, as opposed to inaccuracies resulting from inadvertence. Therefore, the contractor will not be debarred under the Act.

**CONTRACTS****Labor Stipulations****Davis-Bacon Act****Wage Underpayments****Adjustments****Contractor Responsible for Underpayments to  
Employees of Subcontractor**

A prime contractor consented to the payment of Davis-Bacon Act wage claimants underpaid by its subcontractors, though one of its subcontractors had not participated in the proceedings. Pursuant to the Davis-Bacon Act, a prime contractor is financially responsible for wage underpayments to employees by its subcontractors. Therefore, the wage claimants are to be paid in accordance with the prime contractor's consent agreement.

**BIDS** **B-218268.2 Aug. 29, 1985**  
**Invitation for Bids** **85-2 CPD 245**  
**Interpretation**  
**Definitive Responsibility Criteria v. Performance**  
**Requirements**  
**Responsibility v. Responsiveness**

In a procurement for the construction of a composite medical facility, a requirement that only prequalified subcontractors be used for 10 specialty trade areas of the project cannot be reasonably read as precluding the prime contractor from performing a certain specialty area with its own forces if, in fact, capable of doing so. Although the prime contractor was not prequalified for such work during the actual prequalification process, the agency's subsequent qualification of the firm in the specialty area was directly related to its affirmative determination of the firm's responsibility to perform the contract.

**CONTRACTS** **B-218593 Aug. 29, 1985**  
**Negotiation** **85-2 CPD 246**  
**Sole-Source Basis**  
**Justification**  
**Inadequate**

Protest of sole-source award is sustained where the agency, which failed to submit a report responsive to the merits of the protest, did not demonstrate that a sole-source procurement was justified.

**BIDDERS** **B-219341 Aug. 29, 1985**  
**Qualifications** **85-2 CPD 247**  
**Preaward Surveys**  
**Utilization**  
**Administrative Determination**

Contracting officer has discretion not to request a preaward survey of prospective contractor, and GAO will not review such a decision nor an affirmative responsibility determination absent a showing of possible fraud or bad faith, or that definitive responsibility criteria in the solicitation were not met.



**CONTRACTS****Data, Rights, etc.****Disclosure****Unsolicited Proposals****B-219341 Con't****Aug. 29. 1985**

Allegation that agency misappropriated information contained in protester's unsolicited proposal and developed specifications based on that information is denied where the specifications derive from performance and physical specifications in previous procurements and not from the unsolicited proposal.

**CONTRACTS****Negotiation****Conflict of Interest Prohibitions****Organizational****Agency Responsibilities****B-219344 Aug. 29, 1985****85-2 CPD 248**

Responsibility for determining whether a firm has a conflict of interest if the firm is awarded a particular contract and to what extent the firm should be excluded from competition rests with the procuring agency and we will overturn such a determination only when it is shown to be unreasonable.

Protest that award to selected contractor creates an organizational conflict of interest is denied where agency has recognized potential for conflict and taken appropriate safeguards, awardee's proposal contains explicit representation that it will safeguard against such conflicts, and the agency retains right of prior approval of awardee's contract personnel.

**CONTRACTS****B-219344 Con't****Negotiation****Aug. 29, 1985****Offers or Proposals****Evaluation****Allegations of Bias not Sustained**

Bias in the evaluation of proposals will not be attributed on the basis of inference or supposition, and detailed or challenging questions by agency personnel do not establish bias.

**FREEDOM OF INFORMATION ACT****Disclosure Requests****Records of Agencies, etc. Other Than GAO****Authority of GAO to Require Disclosure**

Agency nondisclosure of information in report to protester must be pursued under the Freedom of Information Act, and GAO has no authority to determine what information must be disclosed by agency.

**CONTRACTS****B-219415 Aug. 29, 1985****Negotiation****85-2 CPD 249****Request for Proposals****Requirements Statement Sufficiency**

Protest that agency's estimate of the amount of time of performance for dining facility attendant tasks is inaccurate is denied where protester fails to establish that estimate is not based on the best information available.

<b>CONTRACTS</b>	<b>B-219415 Con't</b>
<b>Negotiation</b>	<b>Aug. 29, 1985</b>
<b>Request for Proposals</b>	
<b>Specifications</b>	
<b>Adequacy</b>	
<b>Scope of Work-Sufficiency of Detail</b>	

**Aug. 29, 1985**

## Request for Proposals

## Adequacy

Where solicitation for dining facility services adequately explains agency needs and performance requirements, fact that agency has not detailed every facet of how performance is to be achieved does not render specification inadequate for competition.

## BIDS

**85-2 CPD 251**

### After Bid Opening

Determination to cancel an invitation for bids, in the form of a letter from the contracting officer to the protester, meets the requirement that the contracting officer make a specific, written determination to cancel, even though the determination is based on advice from technical and legal personnel. By signing the letter, the contracting officer has indicated that he adopts the recommendation to cancel.

**BIDS****Invitation for Bids****Cancellation****After Bid Opening****Justification****Inaccurate Specifications****B-217455 Con't****Aug. 30, 1985**

Agency has a compelling reason to cancel an invitation for bids where the IFB is ambiguous regarding the type of equipment required and bidders are prejudiced by the ambiguous specification, since they were not bidding on a common basis. In addition, the government may be prejudiced by not obtaining the lowest price.

**CONTRACTS****Negotiation****Awards****Initial Proposal Basis****Propriety****B-218389.2 Aug. 30, 1985****85-2 CPD 252**

Award on an initial proposal basis almost 11 months after the receipt of proposals is not in itself improper, although the contracting officer should consider whether events that have occurred in the interim indicate that the government would benefit by holding discussions and requesting best and final offers.

**CONTRACTS****Negotiation****Offers or Proposals****Revisions****Cost**

Although an offeror may condition an extension of the acceptance period for its offer on the agency's acceptance of a revised cost proposal, the offeror may not impose such a requirement 2 months after it grants an unconditional extension.

**CONTRACTS** **B-218443.3 Aug. 30, 1985**  
**Protests** **85-2 CPD 253**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Date Basis of Protest Made Known to Protester**  
**What Constitutes Notice**

Contracting agency's failure to comply with procedural requirements to provide offerors with written preaward notice of the apparent successful offeror and subsequent notice of the award does not indefinitely extend time for filing a protest against an award since protester, having filed a timely protest that was dismissed for procedural reasons, obviously knew of bases for protest without receipt of that notice.

**CONTRACTS** **B-219166.4 Aug. 30, 1985**  
**Protests** **85-2 CPD 254**  
**General Accounting Office Procedures**  
**Reconsideration Requests**  
**Timeliness**

Request for reconsideration of the dismissal of a protest was properly dismissed as untimely where it was filed more than a month after the dismissal of the protest.

**BIDS** **B-219324 Aug. 30, 1985**  
**Invitation for Bids** **85-2 CPD 255**  
**Cancellation**  
**After Bid Opening**  
**Low Bid in Excess of Government Estimate**

Contracting agency's rejection of sole bid on the basis of unreasonable price, resulting in cancellation of the solicitation, was proper when the bid price was significantly higher than the government's estimate and the record discloses no bad faith or fraud on part of the contracting agency in making its determination.

**BIDS**  
**Invitation for Bids**  
**Cancellation**  
**Not Prejudicial**

**B-219324 Con't**  
**Aug. 30, 1985**

Sole bidder on IFB canceled on the basis of unreasonable price was not prejudiced by disclosure of its price and the government estimate to nonbidders where it had opportunity to bid on the resolicitation and was aware of the government estimate.

**CONTRACTS**  
**Protests**  
**Authority to Consider**

**B-219510.2 Aug. 30, 1985**  
**85-2 CPD 256**

GAO will not consider a protest alleging violation of Securities and Exchange Commission regulations since that agency has the jurisdiction to determine if its regulations have been violated.

**CONTRACTS**  
**Protests**  
**General Accounting Office Procedures**  
**Filing Protest With Agency**

GAO will not consider a protest where the protester failed to insure that the procuring agency received a copy of it within 1 day after filing, as required by GAO's Bid Protest Regulations.

**CONTRACTS** **B-219510.2** **Con't**  
**Protests** **Aug. 30, 1985**  
**General Accounting Office Procedures**  
**Timeliness of Protest**  
**Solicitation Improprieties**  
**Apparent Prior to Bid Opening/Closing Date**  
**for Proposals**

Protest against restrictive specifications, filed after bid opening, is dismissed as untimely. Further, the issue will not be considered under either the significant issue or good cause exceptions to GAO timeliness requirements, since there has been no showing of a compelling reason beyond the protester's control that prevented the timely filing of a protest, and the protest does not present a unique issue of widespread interest to the procurement community.

**CONTRACTS**  
**Protests**  
**Moot, Academic, etc. Questions**  
**Challenged Bidder not in Line for Award**

Protest that award to a certain firm will result in a conflict of interest is academic and will not be considered where that firm did not submit a bid.

**CONTRACTORS** **B-219837.2** **Aug. 30, 1985**  
**Responsibility** **85-2 CPD 263**  
**Determination**  
**Review by GAO**  
**Affirmative Finding Accepted**

Protest that bid price is too low to be responsive, that the low bidder may not be able to comply with the contract requirements at the price bid, that a bidder was previously terminated for default and that bidders violated the certificate of independent price determination concern affirmative determination of bidder responsibility which is not for consideration by GAO in the absence of a showing of fraud or bad faith by contracting officials or that a definitive responsibility criteria contained in the solicitation have not been applied.

**CONTRACTORS****B-220005 Aug. 30, 1985****Responsibility****85-2 CPD 257****Determination****Factors for Consideration****Collusive Bidding**

Protest that other bidders failed to arrive at their bid prices independently, thus violating certificate of independent pricing determination, is dismissed. Whether bidder may have engaged in collusive bidding is one circumstance to be considered by the contracting officer in determining whether bidder is a responsible, prospective contractor. Moreover, GAO will not consider a challenge to an affirmative determination of responsibility in the absence of a showing of possible fraud or bad faith.



## TRANSPORTATION LAW

### PROPERTY

B-216757 Aug. 14, 1985

#### Private

Damage, Loss, etc.

Household Effects

Carrier Liability

Burden of Proof

The system used by the Armed Forces for the shipment of household goods provides for written notice (DD Form 1840) of damage to the goods discovered after delivery which identifies the shipment and informs the mover that the owner of the goods intends to file a claim for damages. The movers have agreed that written notice of damage discovered after delivery filed with the mover within 45 days of delivery is sufficient to overcome a prior delivery receipt showing no damage to the goods. DD Form 1840 plus a later claim by the owner specifically describing the nature of the damage to the goods establishes a prima facie case of the mover's liability for the damaged goods. Where the mover furnishes no evidence to rebut a prima facie case, he is held liable.

### PROPERTY

B-215559 Aug. 23, 1985

#### Private

Damage, Loss, etc.

Carrier's Liability

Prima Facie Case

A mover cannot usually avoid a prima facie case of its liability for loss or damage to household goods it transports merely because circumstances prevent it from inspecting the damage. However, where the mover claims that part of the total damages asserted by the Air Force to a shipment were due to items the owner never tendered to the mover for delivery, even though claimed by the Air Force to be lost, the shipper (Air Force) of the goods must furnish some substantive evidence of tender to the mover in order to establish a prima facie case of liability. If no substantive evidence of tender is presented by the shipper, a prima facie case is not established, and the shipper cannot recover from the mover for the alleged loss of the items. Continental Van Lines, Inc., B-215559, October 23, 1984, modified in part and affirmed in part.

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PERMIT NO. G100

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PENALTY FOR PRIVATE USE \$300

WASHINGTON, D.C. 20548

GENERAL ACCOUNTING DIVISION

UNITED STATES DEPARTMENT OF THE ARMY

WASHINGTON, D.C. 20315

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